FILE COPY

No. 571

Office-Supreme Court, U.S.
FILED
DEC 5 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

IN THE MATTER

of

The Application of the BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 3 OF THE TOWN OF OYSTER BAY, NASSAU COUNTY, and of JANE J. SERPE, GLORIA A. DUNAIF and IRIS E. LAVAC, Taxpayers of Union Free School District No. 3 of the Town of Oyster Bay, Nassau County,

Appellants,

for orders under Article 78 of the Civil Practice Act to review, vacate and set aside the determinations of JAMES E. ALLEN, JR., as Commissioner of Education of the State of New York,

Appellee,

(1) Laying out Central School District No. 3 of the Town of Oyster Bay, Nassau County, and (2) that an election shall be held for the purpose of organizing Central School District No. 3 of the Town of Oyster Bay, Nassau County, and vacating the notice of election signed by said Commissioner.

(CONSOLIDATED PROCEEDINGS)

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

JURISDICTIONAL STATEMENT.

JOHN W. BURKE,
Appellants' Counsel of Record in the Supreme Court of the United States,
Office & P. O. Address:
2 Broadway,
New York, N. Y.

SPRAGUE AND STERN,
Attorneys for Appellants,
Office & P. O. Address:
220 Old Country Road,
Mineola, L. I., N. Y.

CHARLES A. BRIND, JR.,
Attorney for Appellee,
Office & P. O. Address:
State Education Building,
Albany, New York.

INDEX.

	PAGE
A. Opinions Below	2
B. Basis for Jurisdiction	2
1. Nature of Proceedings	2
2. Proceedings Below	3
3. Statutory Basis for Jurisdiction	4
4. Cases Sustaining Jurisdiction	4
5. Statutes in Issue	4
C. Questions Presented	5
D. Statement of Case	6
1. Facts	6
2. How Constitutional Issues Were Raised and Disposed of Below	12
E. Substantial Questions are Presented	18
F. Conclusion	24
Appendix A—Dissenting opinion of Hon. Charles W. Froessel	A-1
Appendix B—Opinion of the Supreme Court of the State of New York, Appellate Division, Third Department	B-1
Appendix C—Opinion of the Supreme Court of the State of New York, Schirick, J., decided September 5, 1957. Opinion of the Supreme Court of the State of New York, Schirick, J., decided April 29, 1957	C-1

PAGE

APPENDIX D—Order of the Court of Appeals affirming the Appellate Division D-1

APPENDIX E—Order of the Court of Appeals denying motion for reargument but granting amendment of the *remittitur* E-1

APPENDIX F:

N. Y. Education Law, Section 1801(1) F-1

N. Y. Education Law, Section 1801(2) F-2

N. Y. Education Law, Section 1804(5) F-2

N. Y. Education Law, Section 1805 ..... F-3

N. Y. Civil Practice Act, Section 1291 ..... F-4

Table of Cases.

	PAGE
Attorney General of the State of Michigan v. *Lowrey*, 199 U. S. 233	4, 19, 20
Barry v. *O'Connell*, 303 N. Y. 46	12, 22
Bramley v. *Miller*, 270 N. Y. 307	10
Hoeper v. *Tax Commission*, 284 U. S. 206	21
Hunter v. *Pittsburgh*, 207 U. S. 178	4
Myles Salt Co. v. *Board of Commissioners*, 239 U. S. 478	4, 20
Schlesinger v. *Wisconsin*, 270 U. S. 230	23
Securities Exchange Commission v. *Chenery Corp.*, 332 U. S. 194	22
Matter of Vanderbilt, 281 N. Y. 297	21

Statutes.

Constitution of the United States,	
Fourteenth Amendment	5, 6, 12, 18, 24
Title 28, United States Code,	
Section 1257(2)	4
New York Civil Practice Act,	
Article 78	2, 5, 9
Section 1291	4, 11
New York Education Law,	
Section 1081(1)(2)	4, 5, 9, 18, 20
Section 1804	4
Section 1805	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No.

IN THE MATTER

of

The Applications of the BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT No. 3 of the Town of Oyster Bay, Nassau County, and of JANE J. SERPE, GLORIA A. DUNAIF and IRIS E. LAVAC, Taxpayers of Union Free School District No. 3 of the Town of Oyster Bay, Nassau County,

Appellants,

For orders under Article 78 of the Civil Practice Act to review, vacate and set aside the determinations of JAMES E. ALLEN, JR., as Commissioner of Education of the State of New York,

Appellee,

(1) Laying out Central School District No. 3 of the Town of Oyster Bay, Nassau County, and (2) that an election shall be held for the purpose of organizing Central School District No. 3 of the Town of Oyster Bay, Nassau County, and vacating the notice of election signed by said Commissioner.

(Consolidated Proceedings)

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

JURISDICTIONAL STATEMENT.

Appellants appeal from the final order of the Court of Appeals entered on May 29, 1959, affirming an order of the Supreme Court of the State of New York, Appellate

Division, Third Department dismissing the petitions herein, and from the final order of the Court of Appeals of the State of New York granted and entered July 8, 1959 insofar as that order denied appellants' motion for reargument of the appeal to that court, and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

A. Opinions Below.

The majority of the Court of Appeals of the State of New York wrote no opinion. The dissenting opinion of Froessel, J. concurred in by Van Voorhis, J. is reported at 6 N. Y. 2d 871, 188 N. Y. S. 2d 988. A copy thereof is annexed hereto as Appendix A.

The opinion of the Supreme Court of the State of New York, Appellate Division, Third Department, is reported at 6 A. D. 2d 316, 177 N. Y. S. 2d 169. A copy thereof is annexed hereto as Appendix B.

The opinions of the Supreme Court of the State of New York, Albany County, Schirick, J. are not reported officially nor unofficially. Copies thereof are annexed hereto as Appendix C.

A copy of the order of the Court of Appeals affirming the Appellate Division is annexed hereto as Appendix D.

A copy of the order of the Court of Appeals denying appellant's motion for reargument but granting amendment of the *remittitur* is annexed hereto as Appendix E.

B. Basis for Jurisdiction.

1. Nature of Proceeding.

This consolidated proceeding was originally brought under Article 78 of the New York Civil Practice Act to review and set aside two separate determinations by the

Commissioner of Education of the State of New York: (A) Laying out Central School District No. 3 of the Town of Oyster Bay, Nassau County; and (B) directing that an election be held for the purpose of organizing said Central School District. These determinations had purportedly been made pursuant to New York Education Law, Sections 1801 and 1802 respectively. When the petitions came on to be heard at Supreme Court, Albany County, they were consolidated. On this appeal, however, petitioner urges only the issues raised in the first proceeding (the order laying out the Central School District); the issue in the second proceeding involved only the construction of a New York State statute.

2. Proceedings Below.

By order granted and entered November 23, 1957, Supreme Court, Albany County, dismissed the first petition and granted the relief sought in the second petition.

The Appellate Division, Third Department, in its order dated and entered May 19, 1958, modified the lower court by dismissing the second petition and, as so modified, affirmed.

By order dated and entered May 29, 1959 the Court of Appeals of the State of New York affirmed the Appellate Division, two judges dissenting in an opinion.

By order dated and entered July 8, 1959 the Court of Appeals denied appellants' motion for reargument, but granted their motion to amend the *remittitur* by including therein the following statement:

> "Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Appellants contended that section 1801 of the Education Law was unconstitutional in that it deprived taxpayers of their property without due process of law in

violation of the Fourteenth Amendment. The Court of Appeals held that said section was constitutional and that appellants' constitutional rights were not violated." (Appendix E.)

By Notice of Appeal dated and served October 6, 1959, and thereafter filed in the office of the County Clerk of Albany County, New York, petitioners appealed to this court.

3. Statutory Basis for Jurisdiction.

The Jurisdiction of the Supreme Court to review this decision on direct appeal is conferred by Title 28, United States Code, Section 1257(2).

4. Cases Sustaining Jurisdiction.

The following cases sustain the jurisdiction of the Supreme Court to review the orders appealed from on direct appeal:

Attorney General of the State of Michigan v. *Lowrey*, 199 U. S. 233, 26 S. Ct. 27, 50 L. Ed. 167;

Myles Salt Co. v. *Board of Commissioners*, 239 U. S. 478, 36 S. Ct. 204, 60 L. Ed. 392;

Hunter v. *Pittsburgh*, 207 U. S. 178, 28 S. Ct. 46, 52 L. Ed. 159.

5. Statutes in Issue.

Set forth in Appendix F annexed hereto are the texts of the following New York statutes whose validity is challenged on this appeal:

New York Education Law, Sections 1801(1), 1801(2), 1804(5), 1805.

New York Civil Practice Act, Section 1291.

C. Questions Presented.

The following questions are presented by this appeal:

(1) Do the centralization provisions of the New York State Education Law (Section 1801, *et seq.*), violate the due process clause of the Fourteenth Amendment of the Constitution of the United States by permitting the Commissioner of Education to combine appellants' School District with two other School Districts, thereby depriving appellants' of the benefits they sought to achieve through the investment of substantial sums of borrowed money in their school, but at the same time requiring appellants to continue to carry, and, eventually, fully to discharge the existing bonded indebtedness of appellants' school district?

(2) Do the centralization provisions of New York State Education Law (Section 1801, *et seq.*), violate the due process clause of the Fourteenth Amendment of the Constitution of the United States by failing to set forth standards adequate to guide the Commissioner of Education in exercising the administrative power granted to him thereunder?

(3) Does the action of the Commissioner of Education of the State of New York, an administrative officer, violate the Fourteenth Amendment to the Constitution of the United States, by including appellants' School District in a larger district against the express opposition of the majority of the taxpayers in appellants' district, without a hearing of any sort, without making any findings of fact, and without disclosing to the appellants the grounds upon which his administrative determination rested?

(4) Do the provisions of New York State Education Law (Section 1801, *et seq.*), together with Article 78 of

the New York Civil Practice Act as applied by the courts below, deprive appellants of their property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States in that they impose a tax upon the individual appellants but at the same time prohibit them from controverting assumptions of fact on which that tax rests?

(5) Have the appellants been deprived of their property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States by reason of their having been in this proceeding denied a hearing upon the issues of fact raised by the pleadings?

D. Statement of Case.

1. Facts.

The proposed Central School District is made up of three Union Free School Districts; Union Free School District No. 3, (hereinafter referred to as "Brookville"), which is one of the petitioners herein, Union Free School District No. 4, (hereinafter referred to as "Locust Valley"), and Union Free School District No. 6, (hereinafter referred to as "Bayville") (80). These three districts are located in the Town of Oyster Bay, Nassau County, Long Island; Bayville is situated north and east of Locust Valley, which in turn is north of Brookville. Unlike the more densely populated Bayville and Locust Valley Districts (86-91) Brookville is an entirely residential community completely zoned for two acre, single-family residences (81): It has no shopping areas, manufacturing districts, nor centers of population (81). Its assessed valuation of $10,800,000 exceeds Bayville's by approximately two and one-half million dollars, and is slightly less than one-half that of Locust Valley's (82-83).

Brookville has a unique educational problem in that very few of its students attend public high school (87, 91). On the other hand, a large proportion of its children attend the Brookville Grammar School, which provides the highest quality instruction (85-7). Its curriculum is tailor-made for the special needs of the children of Brookville (92). Even though it is a grammar school, it provides for special instruction in such subjects as Latin, home economics, and industrial arts (84). Its facilities are completely adequate for its current and future needs (83-8, 92). Since no more than twenty-five of its high school age students have ever been enrolled in public schools at the same time, Brookville evidently has no need for a high school of its own (91-92). Brookville's taxpayers have supported it in spending large sums of money in order to provide the finest possible education for their children and in order to adapt that education to the special needs of those children. In this endeavor they have incurred a bonded indebtedness of approximately $495,000 (97) which amounts to more than $1,000 per qualified voter (252). By way of contrast, the "per voter" indebtedness in Bayville is approximately $230 and in Locust Valley is only slightly over $12! (97, 253-5).

By far the greatest proportion of the Brookville tax dollar is spent for the grammar school education of the children of the district. In a centralized district where Bayville and Locust Valley, with their large numbers of public high school students, will easily outvote Brookville, the situation clearly will change so that the bulk of the tax dollar would be spent for the construction, operation and maintenance of a new high school which will be of virtually no use to the Brookville children. Moreover, after centralization, the bonded indebtedness which the Brookville taxpayers have already incurred would not be

merged into the total indebtedness of the new district, but would remain a charge upon the taxpayers of the Brookville District (98, 239).

Thus, not only would Brookville be required to pay off the debts which they have already incurred in order to provide a superior, specialized, grammar school education for their children, which inevitably would be watered down once it fell under the control of Bayville and Locust Valley (85-6), but also Brookville taxpayers would have to assume the additional burden of bearing approximately 1/4th the cost of constructing a new high school which few of their children would use, as well as 1/4th the maintenance and operating costs of the new school district, even though their children would constitute only 1/10th of the total school population (82-83, 86-91). In short, the proposed centralization will very likely result in a deterioration of the quality and usefulness of the education which the Brookville children will receive; it will provide virtually no benefit to the Brookville District; and all this will be at a tremendous increase in cost to the taxpayers of the district.

A clue to the real reason behind the desire of Locust Valley and Bayville and of the Commissioner to include Brookville in the central school district is provided by a comparison of the tax rates. For the first year following the proposed centralization, Bayville's tax rate would drop 31¢ per hundred dollars of assessed valuation; Locust Valley's would increase by 5¢; whereas Brookville's would increase by 47¢ (105-6). After construction of the $1,700,000 high school which the Commissioner apparently deems necessary (210, 178-80), but which would be used by a "small and insignificant" number of Brookville students (110-111, 233-4), the tax rate would further increase. With respect to the cost of educating high school students, Bay-

ville's cost as a result of centralization would decrease by $366 per pupil, Locust Valley's would be increased by $59 per pupil, but Brookville's would be increased by $2,000 per pupil (106-7). Clearly, Bayville and Locust Valley want Brookville in this proposed centralization only so that Brookville can help finance the education of Bayville's and Locust Valley's children.

Before laying out the Central School District, the Commissioner was aware that the majority of qualified voters in Bayville and Locust Valley favored the proposal, but that Brookville was virtually unanimous in its opposition (252-5, 259-64, 271-3). Nevertheless, and notwithstanding the manifest inequity imposed upon the Brookville taxpayers, the Commissioner proceeded to lay out a central school district which included not only Locust Valley and Bayville, which need a pubilc high school, but also Brookville, which has no such need.

At the very threshold of this appeal, it is of the utmost importance that the Court take cognizance of how this litigation evolved, for it is only in the context of the Commissioner's actions, pleadings, and procedures that the broad significance of the precise issues can be perceived.

There is only one procedure provided by the law of New York to review such a determination by appellee Commissioner of Education (hereinafter called the "Commissioner") to centralize school districts—Article 78 of the Civil Practice Act. A proceeding thereunder is commenced by the service of a petition in which the persons aggrieved by an administrative decision set forth the grounds for their grievances. The gravamen of such a petition is that the administrator acted arbitrarily, unreasonably, and capriciously.

Since the centralization statute (Education Law, Section 1801) requires neither a hearing, the taking of evidence,

nor a decision by the Commissioner, the only act which could be reviewed here was the centralization order itself. Consequently, when drawing their petition, appellants had no knowledge of the grounds upon which the Commissioner's determination rested. Moreover, as a practical matter, such a petition had to be served within a very short time after the publication of the administrator's order. If not, any grievance which the petitioners might have had would not have been heard, for under the rule of *Bramley v. Miller*, 270 N. Y. 307, unless timely objection is made prior to the election, such objections and grievances as the petitioners may possess become academic.

The next step under the statute is that the administrator must serve an answer in which he "*must set forth such facts as may be pertinent and material to show the grounds of the action taken by the respondent which is complained of.*" (Emphasis supplied; C. P. A. 1291).

What happened in the instant case? The administrator served an answer in which he admitted certain allegations of the petition, and denied others, thereby raising issues of fact with respect to the arbitrariness and unreasonableness of his actions.

Moreover, he neither admitted, nor denied, twenty paragraphs containing specific allegations of fact concerning the Brookville School District. Instead he referred the court to certain "studies for their contents and legal effect" (236, 245). Neither meaning, nor legal effect, can be attributed to such a statement in a pleading. In addition, the respondent-administrator alleged in his answer that these "studies" were "returned herewith and made a part hereof" (251, 257).

Even more significant is what the administrator did *not* do in his answer. He utterly failed to say on what he relied when he decreed centralization. Nowhere did he

allege that these "studies" were accurate, nor that he considered them, nor that he was aware of them, nor that he relied upon them in reaching his determination. In the absence of such allegations, or any one of them, both the statement of the Commissioner and the "studies" themselves are incompetent and were improperly before the court. Beyond that, examination of these "studies" reveals that on their face they are inaccurate, incomplete, and misleading.

How could these incompetent, hearsay, self-serving, inaccurate, misleading, and incomplete documents be deemed compliance with the direction of Section 1291 of the Civil Practice Act, namely, that respondent's answer "*must set forth such facts as may be pertinent and material to show the grounds of the action taken by the respondent which is complained of*"? (Emphasis supplied.)

In seeking to compel the respondent to comply with the Civil Practice Act and to allege in his answer the basis for his determination, petitioners have not been simply insisting on technicalities having no relation to the merits of the proceeding. Since petitioners have not been apprised of the precise basis for the administrator's determination here, they have been wholly unable to attack that determination on any specific factual ground. An administrator may act only in accordance with the statute which grants him his power. Moreover, he may act only within the standards laid down by that statute. Petitioners here have claimed that the respondent did not follow the statutory standards and that he adopted standards not prescribed by the Legislature. In this context, it becomes of the utmost importance to the court and to petitioners that the respondent carefully comply with the statute and apprise all concerned of the basis for his determination, for as the New

York Court of Appeals said, in *Barry* v. *O'Connell*, 303 N. Y. 46, 53:

> "It will not do for a court to be compelled to guess at the theory underlying the [administrator's] action, nor can a court be expected to chisel that which must be precise from what the [administrator] has left vague and indecisive."

In spite of the Commissioner's failure to tell the court the basis for his determination, and notwithstanding the foregoing arguments raised by petitioners, the three Courts below have held on this record that petitioners are entitled neither to further information, nor to a hearing with respect to the centralization order. Should these lower court determinations be upheld, petitioners will have been subjected to the far reaching consequences of centralization, without their ever having learned the basis for the administrator's determination and without ever having been given an opportunity to disprove the facts underlying that determination, whatever those facts may be.

As long as an administrator may refuse to reveal the grounds of his determination, equally as long will parties aggrieved thereby be effectively denied their day in court. Such a result is unjust and violative of the Due Process clause of the Fourteenth Amendment to the United States Constitution.

2. How Constitutional Issues Were Raised and Disposed of Below.

A. The first issue, stated in full as point C-1 above, (p. 5), is the unconstitutionality of requiring the taxpayer-petitioners to continue to pay off the bonded indebtedness on the Brookville School even after centralization.

1. In Supreme Court, Albany County:

(a) Raised:

(1) Petition pars. 38-42 (96-99).

(2) Petition Par. 60 (112-113).

(3) Petitioners' Memorandum, Point III (pp. 21-24).

(b) Disposed of:

(1) Judge Schirick's decision:

"The commissioner's action is based upon the authority granted to him by sections 1801 and 1802 of the Education Law. The constitutionality of such statutory provisions has been sustained by the Court of Appeals (*Matter of Bethlehem Union Free School District* v. *Wilson*, 303 N. Y. 107). Despite petitioners' arguments to the contrary, this court deems such decision to foreclose further consideration by it of the constitutional question" (58-9).

(2) Judge Schirick's order dismissed the petition thereby rejecting petitioners' argument (45-6).

2. In Appellate Division, Second Department:

(a) Raised:

(1) Petitioners' Brief, p. 8.

(2) Petitioners' Brief, Point I-b, pp. 14-18.

(3) Petitioners' Brief, p. 42.

(4) Oral argument.

(b) Disposed of:

(1) In opinion of Appellate Division (387-393), the court purported to dispose of this argument but it missed the point of petitioners' being required to pay its bonded indebtedness even after centralization.

(2) Order of Appellate Division affirmed Judge Schirick's dismissal of the petition thereby rejecting petitioners' argument (361-370).

3. In Court of Appeals:

(a) Raised:

(1) Petitioners' Brief, Point III-A, pp. 33-7.

(2) Oral argument.

(b) Disposed of:

(1) No majority opinion; not covered in dissenting opinion.

(2) Order affirmed Appellate Division, thereby rejecting petitioners' argument.

(3) Court granted amendment of *remittitur*.

B. The second issue stated in full as Point C-2 above, (p. 5), is whether the centralization statute is unconstitutional for failure to set forth adequate standards to guide the Commissioner in making his administrative determination.

1. In Supreme Court, Albany County:

(a) Raised:

(1) Petition Par. 59 (111-112).

(2) Petitioners' memorandum, Point II (pp. 17-20).

(b) Disposed of:

(1) Judge Schirick's decision:

"The commissioner's action is based upon the authority granted to him by sections 1801 and 1802 of the Education Law. The constitutionality of such statutory provisions has been sustained by the Court of Appeals (*Matter of Bethlehem Union Free School District v. Wilson*, 303 N. Y. 107). Despite petitioners'

arguments to the contrary, this court deems such decision to foreclose further consideration by it of the constitutional question" (58-9).

(2) Judge Schirick's order dismissed the petition thereby rejecting petitioners' argument (45-6).

2. In Appellate Division, Second Department:

(a) Raised:

(1) Petitioners' Brief, p. 8.

(2) Petitioners' Brief, Point I-A, pp. 9-14.

(3) Petitioners' Brief, p. 42.

(4) Oral argument.

(b) Disposed of:

(1) Appellate Division opinion (393-401):

"To the extent the question of 'standards' may be thought to have been left open after *Ginther* and in *Wilson*, we are of opinion that the statute is not invalid for a failure of prescription of more detailed standards for the guidance of the administrative action of the Commissioner than those in his broad grant of power in matters of education" (401).

(2) Order of Appellate Division affirmed Judge Schirick's dismissal of the petition, thereby rejecting petitioners' argument (361-370).

3. In Court of Appeals:

(a) Raised:

(1) Petitioners' Brief, Point III-B, pp. 40-42.

(b) Disposed of:

(1) No majority opinion; not discussed in dissent.

(2) Order affirmed Appellate Division, thereby rejecting petitioners' argument.

(3) Court granted amendment of *remittitur*.

C. The third, fourth and fifth issues stated in full at point C-3, C-4 and C-5 above (pp. 5, 6), can be grouped together as presenting a question of procedural due process. Stated generally, petitioners here contend that although their educational system has been disrupted and their tax burden greatly increased, there has never been a hearing on disputed facts, they have never been told the reasons for centralization, and they have effectively been prevented from controverting whatever assumptions may have given rise to the Commissioner's action.

1. In Supreme Court, Albany County:

(a) Raised:

(1) Petitioners' reply to respondent's answer (277-8).

(2) Petitioners' demand for jury trial (281-2).

(3) Preliminary memorandum on motion to dismiss petition, Point I, pp. 6-9.

(4) Memorandum on motion, Point I, pp. 14-16.

(b) Disposed of:

(1) Judge Schirick's decision:

"On June 27 this court rendered a second preliminary decision to the effect that *no issues of fact were presented* which should be tried by a jury.

In the opinion of the court issues of law alone are here presented" (57-8). (Emphasis supplied.)

(Judge Schirick did not discuss the other aspects of the procedural issues which had been presented to him).

(2) Order dismissed petition on the merits (45-6) and vacated petitioners' demand for a jury trial (44-5), thereby rejecting petitioners' argument.

2. In Appellate Division, Second Department:

(a) Raised:

(1) Petitioners' Brief, p. 8.

(2) Petitioners' Brief, Point I-B, pp. 18-21.

(3) Petitioners' Brief, p. 23.

(4) Petitioners' Brief, Point III, pp. 25-32.

(5) Petitioners' Brief, pp. 42-3.

(6) Oral argument.

(b) Disposed of:

(1) Opinion of Appellate Division (410-411) disposes of a part this argument, viz. the legal sufficiency of the Commissioner's answer. The remainder of this issue was not discussed by the Appellate Division.

(2) Order of Appellate Division affirmed Judge Schirick's dismissal of the petition, thereby rejecting petitioners' argument.

3. In Court of Appeals:

(a) Raised:

(1) Petitioners' Brief, pp. 15-16, items 1, 2 and 8; Point I-A, pp. 18-21; Point III-A, pp. 38-40.

(2) Oral argument.

(b) Disposed of:

(1) No majority opinion; but see dissenting opinion of Froessel, J. annexed hereto as Appendix "A".

(2) Order affirmed Appellate Division, thereby rejecting petitioners' argument.

E. Substantial Questions are Presented.

The five issues presented by the Notice of Appeal and by paragraphs C(1) to C(5) of this jurisdictional statement are, for purposes of this exposition of their substantiality, condensed into three issues, namely:

(1) Do the centralization provisions of the New York State Education Law (Section 1801, *et seq.*), violate the due process clause of the Fourteenth Amendment of the Constitution of the United States by permitting the Commissioner of Education to combine appellants' School District with two other School Districts, thereby depriving appellants of the benefits they sought to achieve through the investment of substantial sums of borrowed money in their school, but at the same time requiring appellant to continue to carry, and, eventually, fully to discharge the existing bonded indebtedness of appellants' School District?

(2) Do the centralization provisions of New York State Education Law (Section 1801, *et seq.*), violate the due process clause of the Fourteenth Amendment of the Constitution of the United States by failing to set forth standards adequate to guide the Commissioner of Education in exercising the administrative power granted to him thereunder?

(3) Have appellants been deprived of their property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States by reason of their being deprived in this proceeding of a hearing upon the issues of fact raised by the pleadings in that the Commissioner ordered centralization without a hearing of any sort, without making any findings of fact, and without otherwise revealing to petitioners the facts upon which his determination rested, and in that the statutes in question

as applied in this proceeding impose a tax upon the individual appellants but at the same time prohibit them from controverting assumptions of fact on which that tax rests.

1. The first issue raised is one of substantive due process of law.

In a similar case (*Attorney General of the State of Michigan* v. *Lowrey*, 199 U. S. 233, 26 S. Ct. 27, 50 L. Ed. 167) this Court held constitutional a Michigan statute calling for the centralization of school districts. There, however, the Michigan statute required the new central district to assume and pay the debts of each of the component districts. As this Court expressly noted in its opinion:

> "The act gave to the new district the property within its limits which had belonged to the districts from which it was created, *and required the new district to assume and pay the debts and obligations of the old districts . . .*" (emphasis supplied; 199 U. S. 233 at pp. 237-8).

Not decided in that case was the important question of whether a state may constitutionally combine existing districts into a new central district, and at the same time require the component districts separately to discharge their bonded indebtedness. That issue is squarely presented by this appeal.

In order to provide a superior educational program tailored to the needs of their children, petitioners have incurred a bonded indebtedness of nearly half a million dollars. In effect, this means that each qualified voter in the Brookville District assumed an obligation of over $1,000. This obligation with the interest thereon was to be liquidated over a period of years with moneys to be obtained from self imposed taxation. The sacrifice which the Brookville taxpayers thus imposed upon themselves was made in

order to provide for their children the unique educational advantages afforded by their operation of the Brookville District.

Then the Commissioner, purporting to act under New York Education Law, Section 1801, *et seq.*, by decree, combined Brookville with Locust Valley and Bayville into a single central school district. Under the statute the central school district takes over the operation and control of the Brookville School, thereby depriving petitioners of the unique advantages they had achieved, without granting to them any corresponding benefits. This in itself is unconstitutional. *Myles Salt Co.* v. *Board of Commissioners*, 239 U. S. 478, 36 S. Ct. 204, 60 L. Ed. 392.

Moreover, petitioners' bonded indebtedness *remains* an obligation of the taxpayers of the Brookville District which must be discharged in accordance with the original terms of the bond issue. Thus, while the Brookville taxpayers are deprived by centralization of the benefits which they sought to obtain through their extensive building program, they must nevertheless continue, after centralization, to bear the financial burden of that program and pay off in full their bonded indebtedness.

The constitutional issue thus presented—the issue which was left open in *Attorney General of the State of Michigan* v. *Lowrey*, *supra*—is substantial and should be decided by this Court.

2. The second issue presented is whether the New York Education Law, Section 1801, *et seq.*, is unconstitutional for the reason that it fails to set forth adequate standards to guide the Commissioner in making his determination for centralization.

The Legislature has prescribed two such standards. The Commissioner shall include territory: (a) of suitable size conveniently located for the attendance of pupils, and (b)

having a sufficient number of pupils for the establishment of a central school.

Petitioners contend these standards are so inadequate that even if the Commissioner had operated within their limits (which he conceded he did not) his determination would not have been based upon facts sufficient to justify to any reasonable man this centralization with its resultant tax burdens upon the petitioners.

Just as the Legislature may not arbitrarily fix the measure of a tax by a fiction (see: *Hooper* v. *Tax Commission*, 284 U. S. 206; *Matter of Vanderbilt*, 281 N. Y. 297, 314) neither may petitioners' tax burden be increased by a statute having grossly inadequate standards which by common sense cannot be, and by the Commissioner's own admission* were not, the basis for the action taken in this case.

The patent inadequacy of these standards is revealed by the following:

(a) A reading of the statute itself. There is no mention in the statute of the factors which are universally conceded to be the real basis for centralization, viz., the educational needs, available wealth, social and economic status of the area, school building facilities, and the effect upon the tax rate.

(b) Even the Commissioner was forced to turn from the statute to other standards in order to make his determination.

(c) The Legislature itself, in its own Master Plan for Education, set forth many other standards and guides for centralization, but it neglected to include those standards in the statute (see dissenting opinion of Froessel, J. in the Court of Appeals, Appendix A annexed hereto).

* Brief in Appellate Division, pp. 15-17.

A statute such as this which is inadequate and essentially unrelated to the purpose for which enacted should be stricken.

3. The third issue presented is one of procedural due process.

As this Court noted in *Securities Exchange Commission* v. *Chenery Corp.*, 332 U. S. 194, at p. 196:

> "... A reviewing court, in dealing with a determination ... which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis".

Of course, if the Court is to review administrative action "solely on the grounds invoked by the agency", it must be informed as to what those grounds are. As Judge Lewis of the New York Court of Appeals wrote in *Matter of Barry* v. *O'Connell*, 303 N. Y. 46, at pp. 51-52:

> "* * * the lack of a statement of the factual basis for the determination not only burdens the applicant in preparing his challenge to the determination, but also impedes the Court in its review of that determination. 'If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive. In other words, we must know what a decision means before the duty becomes ours to say whether it is right or wrong.' (citations)"

Just as the Court must be apprised of the facts underlying an administrator's determination before it can review that determination, so must the petitioners here be apprised of the facts underlying the Commissioner's determination to centralize before they may effectively controvert that determination and forestall the increased tax burden which inevitably follows therefrom.

In *Schlesinger* v. *Wisconsin*, 270 U. S. 230, 70 L. Ed. 557, 46 S. Ct. 20, this Court held:

> "* * * a statute which imposes a tax upon an assumption of fact which the taxpayer is forbidden to controvert, is so arbitrary and unreasonable that it cannot stand under the Fourteenth Amendment."

The record is replete with facts demonstrating the effect of the Commissioner's order of centralization upon the taxes which Brookville will be forced to pay. It will impose additional tax burdens in order to finance the educational costs of Bayville and Locust Valley; for not only must petitioners pay off their old bonded indebtedness without help from Bayville or Locust Valley, but they must also assume part of the burden of the existing educational costs of those districts as well as the costs of building additional facilities which are required by Bayville and Locust Valley but which petitioners do not need. All this follows without the benefit of a fair hearing whereat petitioners could controvert the basis for the Commissioner's order of centralization. Thus, what was condemned in *Schlesinger* v. *Wisconsin* and the *Vanderbilt* case has here been condoned.

Petitioner's taxes have been substantially increased based upon assumptions of fact which the Commissioner has kept concealed despite petitioners' efforts to compel their disclosure. Without such disclosure, petitioners are effectively forbidden to controvert the Commissioner's basis

for centralization. As already noted, a statute which permits this procedure is "so arbitrary and unreasonable that it cannot stand under the Fourteenth Amendment."

Judge Froessel, in his dissenting opinion below, revealed the importance of this right of review under the circumstances of this case, when he wrote:

> "The taxpayers (some of whom are parties here) of the appellant school district will be required by the order of centralization to make substantial contributions—because of the district's assessed valuation—to the construction of a high school for the principal benefit of the citizens of the two other districts (since very few of their own children attend public high school), while at the same time they will continue to be responsible for paying off—unassisted—a bonded indebtedness of almost a half million dollars. Surely the district and its taxpayers are entitled to know the justification for this burden in plainer terms than offered in the conclusory statements of the respondent. The court, too, is entitled to know the *factual* basis for the respondent's determination. Otherwise the review for arbitrariness provided for in an Article 78 proceeding such as this is made utterly meaningless." (Appendix A.)

F. Conclusion.

Jurisdiction of the appeal should be upheld and the case set down for argument.

Respectfully submitted,

JOHN W. BURKE,
Appellants' Counsel of Record in the
Supreme Court of the United States.

SPRAGUE AND STERN,
Attorneys for Appellants.

APPENDIX A.

Dissenting Opinion of Hon. Charles W. Froessel.

STATE OF NEW YORK.

COURT OF APPEALS

IN THE MATTER *of* The Applications of the BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT No. 3 of the Town of Oyster Bay, Nassau County, & ors., &c., Appellants, For orders under Article 78 of the Civil Practice Act to review, vacate and set aside the determinations of JAMES E. ALLEN, JR., as Commissioner of Education of the State of New York, &c., Respondent.	No. 393.

FROESSEL, J.: (dissenting)

I dissent and vote to reverse and remit the matter to Special Term for a trial of the issues of fact raised by the pleadings and exhibits attached thereto. Whether the order of centralization was arbitrary and capricious and failed to comply with the terms of the enabling statute (Education Law, §1801, subd. 2) may not be decided on the record presently before us (Civil Practice Act, §1295; *Matter of Mandle* v. *Brown*, 5 N. Y. 2d 51, 65).

I note at the outset that we are not dealing here with the provisions of section 310 of the Education Law ren-

dering certain determinations of the commissioner of education "final and conclusive" (*cf. Matter of Board of Education* v. *Allen*, decided May 28, 1959). These provisions have no application to the commissioner's order laying out a central school district under Article 37.

In *Matter of Bethlehem Union Free School* v. *Wilson*, 303 N. Y. 107, we held that the commissioner's order of centralization was not arbitrary and capricious. There was no trial of issues of fact in that case, since the record before us revealed sufficient justification for the order. The commissioner there placed particular reliance on the fact that the so-called Master Plan for School District Reorganization had recommended the organization of a central school district along virtually the same lines as the commissioner's order. (Report of Joint Legislative Committee on the State Educational System, N. Y. Legis. Doc., 1947, No. 25, p. 22; see, *e.g.*, Record on Appeal in *Bethlehem* case, ff. 277-9, Resp. Br. pp. 14-15). Thirteen of the 18 school districts recommended by the Master Plan for containment in the centralized district were included in the commissioner's centralization order.

In sustaining the order in that case, Special Term wrote (196 Misc. at 244):

> "considerable research and investigation were done by that committee, numerous hearings which were attended by interested persons were held in various parts of the State and the result evolved was such master plan [see p. 16 of Committee Report, *supra*]. While the commissioner was not required to abide by the findings of that committee, it impresses me that his adoption of its plan in laying out the central school district involved here is a very cogent argument against caprice and arbitrary action on his part."

Our court in its opinion (p. 115) was similarly impressed with the fact that the commissioner had followed the Master Plan, stating this as the *first* in a list of circumstances

demonstrating the reasonableness of the commissioner's determination.

The answer of the commissioner in the instant case and the exhibits thereto attached contain no such supporting factual material. The answer by way of defense simply states very generally the powers of the commissioner under the Education Law (pars. 17th and 19th), repeats the language of §1801(2) giving him the power to order centralization (par. 18th), alleges that his action was not arbitrary (par. 20th), and, finally, that "Returned herewith and made a part hereof are the following exhibits:" (1) petition signed by 419 of the 463 qualified voters in appellant District No. 3 (Brookville) objecting to the inclusion of such district in the centralization; (2) petitions of voters of the other two districts requesting centralization; (3) the order laying out the central school district; (4) "Studies made by respondent" in laying out the district.

The "studies" referred to in the answer, at least in part the products of a so-called study group of representatives of the Locust Valley and Bayside districts which met in Albany on September 13th to 14th, 1956, consisted of the following:

1. A financial plan with estimated expenditures including the payments of principal and interest on a $1,700,000 bond issue (for the construction of a junior-senior high school), which plan contained the qualification *"that the estimates contained in this study are based on many variables, changes in any one of which may materially alter the validity of the estimates made."*

2. An admittedly *tentative* transportation cost survey with a strong recommendation "that a *detailed survey be made after centralization* * * *."

3. An instructional program planning sheet and projected estimates of the number of pupils anticipated for the future elementary and secondary program *but with no breakdown whatever* as to the number of pupils

from the *Brookville district* who would attend the secondary schools." (Emphasis supplied.)

The final "study" was a memorandum dated March 14, 1957, from the Chief of the Bureau of Rural Administrative Services to the Assistant Commissioner recommending approval of the establishment of a central school district. This memorandum included the following statements:

"MASTER PLAN

The Master Plan approved a centralization for the Oyster Bay area. This proposal involves about half of the original area. Post-war growth in Nassau County has made it advisable to alter the recommendations for this area.

* * * * * *

STUDIES

The matter of centralization has been under consideration in this area for several years. Recommendations for reorganization were made by the Nassau County School Study Committee in 1951 [not otherwise identified, referred to, quoted from or described]. The Department study was undertaken in September, 1956.

PETITIONS AND SURVEYS

[Statement that there was strong support for the centralization in Locust Valley and Bayville and strong opposition in Brookville] * * * *The Brookville district appears to be a reasonable part of the area of the proposal. There appears to be no valid reason why Brookville should not be included with Locust Valley and Bayville in an area suitable for the organization of a central school district.*" (Emphasis supplied.)

The statement in this recommendation, which was approved and became the basis for the commissioner's

order, purporting to rely in part upon a recommendation in the Master Plan, is *totally unsupported* by an examination of that document. Indeed, the Plan expressly declares at page 467 of the aforesaid Joint Legislative Committee Report that the three union free school districts here involved were among those districts "LEFT FOR FURTHER STUDY AND FUTURE DETERMINATION". It is noteworthy that no mention whatever is made of the Master Plan in the commissioner's brief in this court. This is in marked contrast to the *Bethlehem* case, *supra*, where the commissioner placed great reliance, as did the court in sustaining him, on the recommendation of the Master Plan.

In making their determination, the draftsmen of the *Legislative* Plan, who spent four years in its creation, considered the following factors as significant (Committee Report, *supra*, p. 15):

"1. The educational needs of each area.

   a. The number of pupils to be educated.

   b. The kind of education to be provided.

2. The amount of wealth available for tax purposes for the support of an educational program in terms of need.

3. The school transportation program.

   a. The topography of each area.

   b. The location of highways.

   c. The kind of transportation facilities available.

   d. The time element in the transportation of school children.

4. The social and economic status of each area.

5. The school building facilities.

   a. The maximum use of the present school buildings.

b. The minimum building program in future organization.

6. The problems peculiar to each area."

What indication is there in the instant case that the commissioner has adequately considered all of these factors? Surely the court should not be content with the mere assertion in his brief that

> "the Commissioner as usual has used meticulous care in the preparation for his final issuance of the order * * *",

and the erroneous statement that since "Special Term and the Appellate Division have been unanimous in upholding the Commissioner of Education's order", "It would seem, therefore, that this issue is not before this Court".

The taxpayers [some of whom are parties here] of the appellant school district will be required by the order of centralization to make substantial contributions—because of the district's assessed valuation—to the construction of a high school for the principal benefit of the citizens of the two other districts (since very few of their own children attend public high school), while at the same time they will continue to be responsible for paying off—unassisted—a bonded indebtedness of almost a half million dollars. Surely the district and its taxpayers are entitled to know the justification for this burden in plainer terms than offered in the conclusory statements of the respondent. The court, too, is entitled to know the *factual* basis for the respondent's determination. Otherwise the review for arbitrariness provided for in an Article 78 proceeding such as this is made utterly meaningless.

The order appealed from should be reversed and the matter remitted to Special Term for further proceedings.

* * * * * *

Order affirmed, without costs. No opinion. All concur except Froessel, J., who dissents in an opinion in which Van Voorhis, J., concurs.

APPENDIX B.

Opinion of the Supreme Court of the State of New York, Appellate Division, Third Department.

Petitioners, who comprise both the Board of Education and also certain taxpayers, of a union school district seek to annul an order of the State Commissioner of Education laying out a new central school district. The district in which petitioners have an interest would be embraced in the new central district. The court at Special Term has in part sustained and in part annulled the order of the Commissioner. There are cross-appeals.

The central school district laid down by the order of the Commissioner is in the Town of Oyster Bay, Nassau County. It would bring in three existing union free districts, which for convenience will be called Brookville (District 3); Locust Valley (District 4); and Bayville (District 6). It is not in dispute that the main aim in setting up the proposed central district by the Commissioner's order is to provide facilities for secondary education.

The record makes it clear that public sentiment is in favor of the establishment of the central district in Locust Valley and Bayville; but in the Brookville district represented by petitioners, public sentiment is very strongly against its establishment. The voting ratios in Locust Valley and Bayville are such, however, that it is manifest that upon submission of the order setting up the central district for approval, Brookville will be swept into the new district against its manifest preference.

The reasons which underlie the opposition of Brookville to the centralized school process are readily demonstrable. Brookville is a school district of relatively large wealth per capita; it has spent and committed itself to pay bond issues to provide unusually good primary education for its children at considerable greater cost per pupil than the expenditures made by the other districts; and nearly all of its children will go from this excellent primary school.

not to any public high school, but to private secondary schools.

The Brookville district feels, therefore, that it has no substantial need for high school facilities for its own pupils; and that being included with its two neighboring districts, which concededly need high school facilities, will merely increase unduly its tax burden without substantial benefit to itself or the needs of its children. For these reasons, among others, petitioners contend that the order of the Commissioner including Brookville within the central district is arbitrary and unreasonable.

It is argued, additionally, that the Commissioner did not follow the statute in determining that the order creating the central district should be made; and the individual petitioners allege that in any event the statute is unconstitutional and the Commissioner's order purported to be in pursuance of the statute in its tax impact on them is in violation of their individual rights.

We address ourselves first to the constitutional problem as it is posed by petitioners in its broadest reach: that any legislative or administrative scheme which permits a tax district to be cast in with another and larger district against its will and under circumstances where, in the pooled fiscal apparatus of the larger district, it will surely lose the autonomy and right of fiscal decision it has heretofore exercised, is a deprivation of the right of self-determination by the public tax district and does violence to the constitutional rights of its taxpayers.

Indeed, it is argued by the individual petitioners that in the increased tax burden imposed by this scheme they are deprived of due process of law. The literal argument advanced in petitioners' brief is that the order of the Commissioner "discriminates against them in that their tax burden will be increased to pay for the education of children of the other two districts without corresponding benefit to them, and in that the statutory procedure virtually deprives them of any right of self-determination with respect to their educational system". A statute, it is argued which "thus penalizes a district" deprives the district taxpayers of due process of law.

The theory of taxation is that it supports the public welfare, as that may from time to time and from place to place, be conceived to be. It is usually assumed that the tax levy meets minimal constitutional safeguards against discrimination if the people who pay the tax are treated alike, and the same approximate standard of extraction is followed based, for example, on the amount of income a man receives, or the value of real property he owns in the tax district.

These standards of extraction may not be exactly just or perfectly fair, but they must be put up with. That one man may in the general interest get more benefits from public tax money than another, has never been regarded as a good reason why the other should not pay his share of the tax. The general services of the State are not bought, item by item, merely by those who use them. Public services are thought to be generally important enough to be provided by the whole community for those who need them.

People without children pay for schools; men and women who go through life without litigation must support the courts; people help pay for roads they never use and never see; families in sound mental health help sustain the hospitals for the mentally ill; residents of Kings help acquire and preserve the remote forest lands of Hamilton.

It is one of the concomitant local inequities of the modern state that well-off geographical sections are likely to spend more than they ever hope to get back in carrying along the general burden; and that economically strong areas help sustain the weak ones. This is true within the Federal Union; within the State of New York; within cities, within counties; and within central school districts.

But a local inequity is not necessarily a general injustice and while the individual petitioners make out an appealing case of carrying more than they think warranted of the burden, placed alongside the benefits of the new district, they do not make out a case of constitutional discrimination for which a law court is able to afford redress.

Besides these broad constitutional arguments penetrating into the area of political economy, the individual tax-

payers pursue a more conventional form of constitutional attack upon the statute under which the Commissioner acted in making his order laying out the proposed district. It is contended that Education Law, §1801, is unconstitutional in the sense "it fails to specify standards adequate to guide the Commissioner in laying out central school districts" and is therefore invalid.

The only specifically prescribed statutory duty of the Commissioner in laying out a central district is that he "shall include only territory of suitable size conveniently located for the attendance of pupils and having a sufficient number of pupils for the establishment of a central school". (Section 1801, subd. 2). One aspect of the constitutionality of this statute, that it was an invalid delegation of legislative power, was answered in a taxpayer's challenge in *Gardner v. Ginther* (232 App. Div. 296; aff'd 257 N. Y. 578) by holding the power to be administrative and not legislative; a view reiterated in *Matter of Bethlehem Union Free School v. Wilson* (303 N. Y. 107, 114-115).

In truly "administrative" acts, if the administrator follows the form of the statute which lays down his powers, "standards" are irrelevant and not a subject of interest or concern to the court. How many policemen are assigned to a street intersection; whether a street is to be cleaned Monday or Friday; whether a road is to be constructed here rather than there, whether traffic is to be routed one way and not another, are not matters that need prescriptive "standards" found in a law to be properly confided to a public agency; they are matters that need judgment and may be granted to the administrator in broad terms.

The "standards" that the courts hold are to "guide" the administrator, aside from legislative delegation, are standards that he must look to when he undertakes to act in something like the role of the judge, in the "quasi-judicial" area, to decide private rights. In such cases "standards" become valuable guides to the judge on review; and the need for standards is coextensive with the willingness of the court to examine and annul what the administrator has done with the rights of the individual.

It is, perhaps, useful in gaining a perspective of the problem presented by the petitioners to examine illustrations of the boundaries of administrative function and power that have been laid down judicially; and distinctions which have been drawn by the court between different categories of administrative power.

It is a common thing for the court to look at the statutory authority and also at what the administrator has done to see whether he has kept within the frame of his powers.

Good illustrations of this process are to be found in *Matter of Cherry* v. *Board of Regents* (289 N. Y. 148) where the Regents were found to have exceeded the literal statutory grant of power to discipline a dentist; in *Bus Depot Holding Corp.* v. *Valentine* (288 N. Y. 115) where the Police Commissioner was found to have exceeded the grant of power in excluding interstate busses from the streets; and *Matter of Small* v. *Moss* (279 N. Y. 288) where refusal to issue a theatre license because of increased traffic hazard was held beyond the legal frame of power of the licensing officer.

These cases illustrate, not the inadequacy of "standards" of delegation; but the failure to delegate enough and they are essentially cases based on a plain absence of administrative power as the court read the statute. When one turns to quasi-judicial power exercised by an administrator, one sees other needs. Since the administrator acts also as a judge, he must have, as a judge must have, evidence, i.e. "substantial evidence" to sustain him. (*Matter of Kopec* v. *Buffalo Brake Beam, Etc., Iron Wks.*, 304 N. Y. 65).

On still another aspect of administrative law, when the court thinks that there is undue delegation of "legislative power" it will not sanction the administrator's attempting to exercise it (*Matter of Seignious* v. *Rice*, 273 N. Y. 44). An extreme form of restriction on this ground is to be observed in *Matter of Lyons* v. *Prince* (281 N. Y. 557) where a commissioner of buildings was held not to have acted within the frame of his legal power to require certain construction to conform with safety in addition to the words appearing in the statute. A good illustration of what may

be regarded or not regarded as arbitrary when the administrator keeps within the statutory frame is *Matter of Marburg* v. *Cole* (286 N. Y. 202).

To the extent the question of "standards" may be thought to have been left open after *Ginther* and in *Wilson* we are of opinion that the statute is not invalid for a failure of prescription of more detailed standards for the guidance of the administrative action of the Commissioner than those in his broad grant of power in matters of education.

Whether the Commissioner followed the frame of the statutory power given him by the Legislature is quite a different matter; and is not to be confused with the legal concept of invalidity of the statute because of a failure of the Legislature to set up standards in giving that power. The statute here, as it has been noticed, does set up the conditions under which the Commissioner may make an order laying out a central district. He must meet those terms to make a valid order; and at this point the petitioner union school district as a public corporation to which such an issue of law is also available, joins the individual taxpayers in their attack on the order.

If the terms of the statute have not been followed the power of the court to annul is undoubted and is conceded by the Commissioner. The central district, so runs the statute, shall include "only territory of suitable size conveniently located for the attendance of pupils and having a sufficient number of pupils for" the establishment of such a district (Section 1801).

The attack on the Commissioner's order for failure to follow his statutory authority lies in two branches: (a) that in deciding to lay down the central district he could consider only the conditions written out in the statute and no other conditions; and (b) that the statutory conditions have not been met in the proposed central district.

The first argument is one carried over from quasi-administrative determinations where an administrator decides individual rights within the frame of a statute prescribing those rights. One of the two authorities relied on is *Barry* v.

O'Connell (303 N. Y. 46), a liquor license case; the other is *Picone* v. *Commissioner of Licenses* (241 N. Y. 157), where a junk boat license was denied on two stated grounds neither of which was authorized by statute.

These authorities have no relevancy to the decision of the Commissioner of Education to lay down a central school district. Section 1801 provides the minimum conditions of what a district shall contain as to geographical size and number of pupils. To say that is all there is to it, is grossly to underestimate the responsibility and duty of the Commissioner. He could, and certainly should in the conscientious exercise of his function, take into consideration a wide range of questions of sound administration and good educational policy and practice, standing well above the minimal statutory requirements of size and number.

It seems reasonably clear that the conditions of geographical size and minimum number of pupils are legislative minimal prescriptions without the existence of which the Commissioner would not lay out a central school district; but assuming these bare conditions of size and number to exist, the Commissioner clearly has the duty of considering nevertheless whether it is wise and desirable to make the order for the district and of examining all the complicated and relevant data which may bear on such a decision. To say, as petitioner seems to say, that he is to close his eyes to all beyond convenient size and number of pupils is to do violence to the statute and the Commissioner's powers.

On the second branch of the argument based on a failure of statutory compliance, it is contended that the central district as laid out is not "of suitable size conveniently located". The burden of this argument is that since the central school must be placed in one of the three present districts it will be relatively (depending on where it is located) inconvenient for pupils from the other two to get there.

Essentially this is an argument against the policy of establishing central school districts: "the larger the geographical central school district, the greater the inconvenience of attendance to pupils" (Petitioner's Brief, p. 33).

This is something inherent in the idea of a central district and the statutory words "conveniently located" necessarily are to be read to mean convenience within the scope of the central school concept by keeping in mind that no central school would possibly be quite as convenient as having complete secondary school facilities in each existing district.

It is further argued that convenience is not promoted by including Brookville in the district; but this seems to us to be a question of sound administrative judgment and a question which the Commissioner surely is more competent to decide than the court. We are not able to hold, surely, that his determination is arbitrary in this respect. The additional argument that Brookville, in or out, would not have much effect on the requirement for "a sufficient number of pupils" falls in the same class. The studies accompanying the Commissioner's answer, some of which are attached also as exhibits to the petition, indicate that the order setting up the central district looks to the needs of the future, and even at present ratios Brookville ought to share in the pupil increase projected into 1960-1961.

The answer interposed by the Commissioner in our view is a sufficient pleading. Although petitioners argue that there is no allegation that the Commissioner considered the detailed statistical and fiscal studies and projections attached to the answer in making his determination, his pleading with respect of the most detailed of them is that they were "studies made by the respondent", which means he made them, or as head of the department, had them made for his use, which amounts to the same thing. We are of opinion that the determination of the court at Special Term dismissing this portion of the petition as now consolidated was correct.

Before it becomes effective, an order of the Commissioner laying out a central school district must be followed by certain organizational procedures; and the Special Term has annulled a notice of election and an election in the district held in pursuance of the notice because the court found that one of the essential procedures had not been followed in accordance with the statute.

This proceedural failure was in the sufficiency of the petition asking for the organization of the new district as provided by Section 1802, subd. 1-a, of the statute. Since decision turns on how the statutory language is to be read, it will be useful to quote the pertinent text:

> "1802. 1. New central school districts shall be organized as provided in this subdivision.
>
> a. When an order laying out a central school district has been made and entered as provided in section eighteen hundred one of this chapter, a petition may be presented by persons qualified to vote at school district meetings asking for the organization of a central school district and the establishment of a central school therein. Said petition shall be signed by at least one hundred of such qualified voters or by a number of such qualified voters equal to at least ten per centum of the pupils of said central school district as determined by the last school census, whichever shall be less. If such territory includes one or more cities of less than ten thousand inhabitants or villages having a population of one thousand or more, then such petition shall be signed by at least one hundred of such qualified voters residing within each said city or village, or by a number of such qualified voters residing within each said city or village equal to at least ten per centum of the pupils of the school district residing within said city or village as determined by the last school census, whichever shall be less, and shall also be signed by at least one hundred of such qualified voters residing in said district outside of any city or village or by a number of qualified voters residing in said district outside of any city or village equal to at least ten per centum of the pupils of the school district residing outside of any city or village as determined by the last school census, whichever shall be less."

The district as laid down by the Commissioner which here follows the line of the present Brookville district,

embraces a portion of the Village of Brookville and a portion of the Village of Old Brookville. About one-third of the former and one-tenth of the latter are within the present Brookville district and thus would be within the new central district. There is a dispute about the population, but for the purpose of this proceeding we assume that each of the two villages has a population in excess of 1,000.

If the only test set up in the statute were that fixed by the word "includes" no one would have much difficulty in reading the language to mean an intent to require the special number of signatures only when the proposed district embraced an entire village. That is the plain meaning of the words "includes one or more * * * villages having a population of one thousand or more", read in context with the phrase "such qualified voters residing within such village."

Not any of these words could fairly be construed to mean a portion of a village; they relate to a village in entity. A statute which demands a prescribed inclusion of an entity is not satisfied by an inclusion of something less than the entity prescribed.

The words on which petitioners mainly rely to carry a construction to require the special number of village signatures even though the district does not include the entire village are these: "then such petition shall be signed by at least one hundred of such qualified voters residing within each said * * * village, or by a number of qualified voters residing within each said * * * village equal to at least ten percentum of the pupils of the school district residing within said * * * village."

It is argued that ten per cent of the pupils "of the school district" who are "residing within said * * * village" would not have been used by the Legislature unless it had intended to have the test met in villages that might only partly be included in the district. It is said that if the Legislature had meant that the special number of village signatures are to be required only if the entire village is included in the district, it would have provided, merely, ten

per cent of the pupils residing in the village, and would have found it unnecessary to say "of the school district".

From this it is argued that the Legislature intended to require the special number of village signatures where there is any part of the district within the village, i.e., where any number of pupils "of the school district" reside in the village.

The answer to this argument does not depend merely on the ordinary meaning that is to be attached to the word "includes" as embracing the village in entity; it is to be gathered from other contextual expressions, and to be inferred from the general use of the formula in other parts of the statute.

In the first place it is clear that the "persons qualified to vote" who are entitled to sign this petition are residents of the existing school districts to be embraced in the central district, and no others. The first sentence of subdivision 1-a defines the persons who may sign the petition as those "qualified to vote at school district meetings".

But if the petitioners' reading of the language be followed, any resident of the village qualified to vote in a school district meeting could sign the petition whether he was a resident of the district involved or not; because while the language runs "ten per centum of the pupils of the school district residing within each * * * village" the voters who are counted on this basis of this percentage are not voters "of the school district", but voters "residing within * * * said * * * village". Therefore if this construction be adopted, the number of pupils in the village and also in the district is counted for computing the number of voters needed to sign the petition, but those voters need not be voters of the district as well as of the village, but merely voters of the village.

To take this literally as a consequence of petitioners' argument is to say that when part of a village comes within the proposed district all qualified voters of the village, in or out of the district, are qualified to sign the petition. This is quite manifestly what the Legislature did not intend to to allow, and hence the construction that a whole and not

fragmentary part of a village was intended, which would in any event be made from the word "includes", seems to be given new strength when the alternative suggested by the petitioners' argument is examined carefully.

It will be noticed that the number of voters to be counted on the basis of ten per cent of pupils is not a special formula related to villages. It is an alternative formula which runs through this subdivision, and, indeed, through the section itself, and it has therefore no particular significance in determining whether a whole village or a part was intended by legislative contemplation to come within the word "includes". See, for example, the ten per cent of the pupils "of said central school district" and ten per cent of the pupils "residing outside" any "village" in context in the same subdivision, which seems, additionally, to give further force to an intention to treat the territory within (i. e. not "residing outside") a village in the sense of entity.

Other similar language based on a percentage of pupils relating to voters appears, for example, as part of the alternative formula in subdivision 2-b of the section. Besides all this, the basic provision for signatures in subdivision 1-a, before the alternative based on percentage is set forth, that is, at least one hundred "of such qualified voters residing within" the village, helps make clear the legislative intent to require the specially designated village voters signatures only when the whole village is to be within the central district.

The order of the Special Term should be modified to vacate that part thereof which annuls and sets aside the petition for the election and the election and to deny the petitioners' application in these respects; and as thus modified the order should be affirmed without costs.

APPENDIX C.

Opinion of the Supreme Court of the State of New York, Schirick, J., Decided September 5, 1957.

Two separate proceedings were commenced initially. They have been consolidated upon motion of the petitioners to which the respondent consented. Each proceeding was brought by the Board of Education of School District No. 3, Town of Oyster Bay, Nassau County, as one interested party, and by certain taxpayers of the district, as other interested parties.

The first proceeding is brought pursuant to article 78 of the Civil Practice Act to review and annul the determination of the respondent, the Commissioner of Education of the State of New York, laying out Central School District No. 3 of the Town of Oyster Bay as a central district.

The second proceeding is brought to review and set aside the order of the commissioner calling for an election of the qualified voters of the district to determine whether the organization of such central school district shall be approved.

On April 29, 1957 this court rendered a preliminary decision denying the petitioners' request for a stay of the election without prejudice, however, to the questions raised by the petitioners with reference thereto, but staying all proceedings subsequent to such election pending the determination of the issues herein.

On June 27 this court rendered a second preliminary decision to the effect that no issues of fact were presented which should be tried by a jury.

In the opinion of the court issues of law alone are here presented.

The commissioner's action is based upon the authority granted to him by sections 1801 and 1802 of the Education Law. The constitutionality of such statutory provisions has been sustained by the Court of Appeals (*Matter of Bethlehem Union Free School District* v. *Wilson*, 303 N. Y. 107).

Despite petitioners' arguments to the contrary, this court deems such decision to foreclose further consideration by it of the constitutional question.

Here, as elsewhere in the law, very broad discretionary powers are conferred upon the Commissioner of Education in defining and implementing educational policy. In laying out a central district the commissioner must be satisfied of but three things:

(1) that the area is of suitable size;

(2) that it is conveniently located for the attendance of pupils; and

(3) that it has a sufficient number of pupils.

The studies made by the commissioner furnish ample support for the finding implicit in his determination that the size of the area and the number of pupils therein, present and prospective, are suitable and sufficient. The geography of the area and the means of communication existing therein establish reasonable basis for a finding that it is conveniently located for the attendance of pupils. These determinations were for the commissioner to make. Absent a showing that they are arbitrary or capricious, the court may not interfere. Certainly there is no occasion or justification for substitution of the decision of a jury upon such matters for the discretionary determination of the commissioner.

It is the conclusion of the court that the order of the commissioner in laying out the central school district in question was validly made pursuant to the discretionary powers conferred upon him by law. The first proceeding is accordingly dismissed.

The second proceeding questions the sufficiency of the petition upon which the commissioner directed an election.

Section 1802 (subd. 1, par. [a]) of the Education Law provides as follows:

"1. New central school districts shall be organized as provided in this subdivision.

"a. When an order laying out a central school district has been made and entered as provided in section eighteen hundred one of this chapter, a petition may be presented by persons qualified to vote at school district meetings asking for the organization of a central school district and the establishment of a central school therein. Said petition shall be signed by at least one hundred of such qualified voters or by a number of such qualified voters equal to at least ten per centum of the pupils of said central school district as determined by the last school census, whichever shall be less. If such territory includes one or more cities of less than ten thousand inhabitants or villages having a population of one thousand or more, then such petition shall be signed by at least one hundred of such qualified voters residing within each said city or village, or by a number of such qualified voters residing within each said city or village equal to at least ten per centum of the pupils of the school district residing within said city or village as determined by the last school census, whichever shall be less; and shall also be signed by at least one hundred of such qualified voters residing in said district outside of any city or village or by a number of qualified voters residing in said district outside of any city or village equal to at least ten per centum of the pupils of the school district residing outside of any city or village, as determined by the last school census, whichever shall be less."

It is the contention of the petitioners that pursuant to such statute separate petitions were required to be executed by the requisite number of qualified voters of the villages of Brookville and Old Brookville. It is the position of the respondent that the statute does not require such petitions since (1) not the whole but only a part of such villages is included within the district and (2) neither of such villages had a population of 1000 or more at the time of the last census (General Construction Law, § 37-a).

The latter contention is not open to the respondent in view of the admission in his answer of paragraph 6 of the petition.

The contention that the statute applies only where all of a village is included in a district cannot be accepted. The alternative provision of the statute permitting signatures by a number of qualified voters of the village "equal to at least ten per centum of the pupils of the school district residing within said * * * village" would appear to contemplate a situation where part only of a village is included.

The petitioners are entitled to the relief demanded in the second proceeding.

Submit orders accordingly.

Papers may be obtained at Supreme Court Chambers, Kingston, N. Y.

Decided: September 5, 1957.

Opinion of the Supreme Court of the State of New York, Schirick, J., Decided April 29, 1957.

The petitioners have brought this proceeding pursuant to article 78 of the Civil Practice Act to annul the determination of the respondent, the Commissioner of Education of the State of New York, laying out a central school district and directing an election to determine whether such district should be organized and a central school established therein. Such election is scheduled to be held on May 4. Petitioners contend that the petition upon which the election was ordered does not contain the signatures required by section 1802 (subd. 1, par. a) of the Education Law, and ask that the election be stayed pending the determination of such issue. They urge that if the election is held they will be foreclosed from attacking the sufficiency of the petition, and cite in support of such contention the decision of the Court of Appeals in *Bramley* v. *Miller* (270 N. Y. 307).

An examination of the opinion indicates that petitioners' fears are not well founded. In *Bramley* v. *Miller* (*supra*) the petitioners never raised the issue of the qualifications of one of the signers until after the election had been held. Under such circumstances the court well stated:

> "The provisions of the Education Law were substantially complied with, and the minor defects appearing in the petition calling for the meeting of October 26, 1933, could not and did not affect the legality of that meeting after it had been acquiesced and participated in by the inhabitants of the district without any objection or protest." (p. 312)

In the present case the petitioners have raised the issue prior to the election. By the service of their petition and by their application for a stay they have done all within their power to secure a determination. It is inconceivable that, under such circumstances, they should waive any of their rights by the fact that an election is to be held during the pendency of the proceeding.

The petitioners are entitled to a stay in the form which was in effect in *Matter of Board of Education v. Wilson*, (303 N. Y. 107). Such stay will apply to all proceedings subsequent to the election. A stay of the election itself is denied without prejudice to the questions raised by the petitioners.

Briefs are to be exchanged and all papers submitted within two weeks.

Decided: April 29, 1957.

APPENDIX D.

Order of the Court of Appeals Affirming the Appellate Division.

COURT OF APPEALS

STATE OF NEW YORK, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 29th day of May in the year of our Lord one thousand nine hundred and fifty-nine, before the Judges of said Court.

WITNESS,

The Hon. ALBERT CONWAY,
Chief Judge, *Presiding*.

RAYMOND J. CANNON, *Clerk*.

REMITTITUR..... May 29, 1959.

No. 393.

In the Matter

of

The Applications of the Board of Education of Union Free School District No. 3 of the Town of Oyster Bay, Nassau County, & ors., &c.,

Appellants,

For orders under Article 78 of the Civil Practice Act to review, vacate and set aside the determinations of James E. Allen, Jr., as Commissioner of Education of the State of New York, &c.,

Respondent.

Be it Remembered, That on the 24th day of December in the year of our Lord one thousand nine hundred and fifty-eight, Board of Education of Union Free School District No. 3 of the Town of Oyster Bay, Nassau County, & ors., &c., the appellants in this cause, came here unto the Court of Appeals, by Sprague & Stern, their attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And James E. Allen, Jr., as Commissioner of Education of the State of New York, the respondent—in said cause, afterwards appeared in said Court of Appeals by Charles A. Brind, Jr., his attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Henry Root Stern, Jr., of counsel for the appellants, and by Mr. Charles A. Brind, Jr., of counsel for the respondent, brief filed by *amicus curiae*,

and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, without costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, without costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON,
Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,

Albany, May 29, 1959.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON
Clerk.

[SEAL]

APPENDIX E.

Order of the Court of Appeals Denying Motion for Reargument But Granting Amendment of the Remittitur.

STATE OF NEW YORK,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the eighth day of July, A. D. 1959.

Present, Hon. ALBERT CONWAY,
Chief Judge, presiding.

IN THE MATTER *of* The Applications of THE BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT No. 3 of the Town of Oyster Bay, Nassau County, & ors., &c., Appellants, For orders under Article 78 of the Civil Practice Act to review, vacate and set aside the determinations of JAMES E. ALLEN, JR., as Commissioner of Education of the State of New York, &c., Respondent.	Mo. No. 371

A motion for reargument and to amend the remittitur in the above cause having been heretofore made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion, insofar as it seeks reargument be and the same hereby is denied, and it is

FURTHER ORDERED, that the said motion, insofar as it seeks to amend the remittitur, be and the same hereby is granted. Return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

> Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Appellant contended that section 1801 of the Education Law was unconstitutional in that it deprived taxpayers of their property without due process of law in violation of the Fourteenth Amendment. The Court of Appeals held that said section was constitutional and that appellants' constitutional rights were not violated.

AND the Supreme Court, Albany County, is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

GEARON KIMBALL,
Deputy Clerk.

APPENDIX F.

New York Education Law.

The commissioner of education is hereby authorized and empowered to lay out central school districts for the establishment of central schools to give instruction in elementary or elementary and high school subjects and to fix, determine and define the boundaries of said districts as hereinafter provided.

* * * * * *

The commissioner is authorized and empowered to make and enter in his office orders laying out territory in new central school districts or annexing to existing central school districts territory not contained within a city school district in a city having a population of more than ten thousand inhabitants, and not contained within a city school district having a full valuation of taxable real estate per public school pupil residing in the district of more than fifteen thousand dollars; provided, however, that no territory contained within a city school district in a city having a population of ten thousand inhabitants or less may be included in new central school districts or annexed to existing central school districts after July first, nineteen hundred fifty-five. The commissioner of education is authorized and empowered to make and enter in his office orders dissolving and annexing a central school district or districts to another central school district, pursuant to the provisions of subdivision two of section eighteen hundred two of this chapter. The commissioner in laying out such central school districts and in fixing and defining the boundaries thereof shall include only territory of suitable size conveniently located for the attendance of pupils and having a sufficient number of pupils for the establishment of a central school. The commissioner shall designate all central school districts by name, number and such other description as he shall deem proper.

* * * * * *

Nothing herein contained shall be construed to deprive any existing school district of the property belonging to such district, or to affect the indebtedness of said district. An existing district within the meaning of this article shall be construed to mean a district that lies within the boundaries of a central school district. Each such existing district shall be deemed to continue to exist in law for the purpose of paying all its just debts, including obligations lawfully issued prior to the organization of such central school district, together with all interest thereon as the same shall fall due. In levying the annual school tax upon the property of such central school districts, the board of education shall also assess and levy upon the taxable property of each such existing district which has an outstanding indebtedness, an additional sum sufficient to pay all of such indebtedness which shall fall due during the school year for which the tax is levied less any sum received by such central school district and apportioned and credited to the existing school district pursuant to the provisions of subdivision four of section eighteen hundred six of this article.

* * * * * *

All central school districts shall have the same powers and be subject to the same limitations that are now conferred or imposed by law upon union free school districts as provided by this chapter except that in each existing district maintaining a school at the time of centralization the central school district shall continue to maintain such school for the instruction of pupils therein up to and including the sixth elementary grade for a period, commencing on the day of centralization, of not less than five years, unless the legal voters of such existing district at a meeting of such voters duly called by the board of education of such central school district shall, by majority vote of those present and voting at such meeting, determine to discontinue the school in such existing district prior to the expiration of such minimum five year period and in such case the school shall be discontinued accordingly. At any time after the expiration of such minimum five year period the board

of education of the central school district may, by a majority vote of the members thereof, discontinue such school in such existing district, provided, however, that in the event the legal voters of such existing district shall have determined not to discontinue such school at a meeting of such voters duly called upon such question, the board of education of the central school district may not discontinue such school until after the expiration of a period of five years following such determination by such legal voters. The district officers of the several existing districts shall remain in office until August first next following organization of such central school district for the purpose of conducting and maintaining school in the several districts, the carrying out of contracts in force at the time of the organization of such central school district, of paying all just debts and obligations of such existing districts due and payable on or prior to said August first, and of levying and collecting taxes raised or necessary to be raised for any of said purposes. For the purposes of the apportionment and payment of public moneys, notwithstanding any other provisions of this article, any apportionments and payments made during the school year in which such central school district was organized shall be apportioned and credited to the existing districts. Any apportionments made and paid during the school year next succeeding the date of the organization of such central school district shall be made and credited to the central school district but the amounts thereof shall be determined upon the basis of the continuance of the existing districts as separate districts during the entire school year in which such central school district was organized.

* * * * * *

N. Y. Civil Practice Act.

Answer. At least two days prior to the return day, unless a different time is fixed in the order to show cause, the respondent shall serve upon the petitioner, and file with the clerk of the court, a verified answer. The answer must contain proper denials and statements of new matter, as

in an action, and must set forth such facts as may be pertinent and material to show the grounds of the action taken by the respondent which is complained of; but it may not contain a counterclaim. The respondent shall annex to the answer [1]*filed with the clerk of the court*[1] a certified transcript of the record of proceedings subject to review or consideration. [2]*Where more than one proceeding is brought to review the same determination, the filing of one certified transcript of the record shall be sufficient. The respondent*[2] shall also serve and submit with the answer affidavits, made by a person having knowledge of the facts, or other written proof, showing such evidentiary facts as shall entitle him to a trial of any issue of fact.

Where the proceeding is brought to restrain a body or officer exercising judicial or quasi-judicial functions from proceeding without or in excess of jurisdiction in favor of another party, the latter may serve and file a separate answer, or unite with the body or officer in an answer, or annex to the body's or officer's answer an instrument in writing, subscribed by him, to the effect that he adopts it and relies upon the matters therein contained as sufficient cause why the body or officer should not be restrained; in which case, the party shall thenceforth be deemed the sole respondent in the proceeding; except that a final order in favor of the petitioner must be directed against both the body or officer and the party.

FILE COPY

Office-Supreme Court, U.S.
FILED
JAN 5 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1959

No. 571

In the Matter of the Applications
of
The BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 3 of the TOWN OF OYSTER BAY, NASSAU COUNTY, and of JANE J. SERPE, GLORIA A. DUNAIF and IRIS E. LAVAC, Taxpayers of Union Free School District No. 3 of the Town of Oyster Bay, Nassau County,

Appellants,

For orders under Article 78 of the Civil Practice Act to review, vacate and set aside the determinations of JAMES E. ALLEN, JR., as Commissioner of Education of the State of New York.

Appellee,

(1) Laying out Central School District No. 3 of the Town of Oyster Bay, Nassau County, and (2) that an election shall be held for the purpose of organizing Central School District No. 3 of the Town of Oyster Bay, Nassau County, and vacating the notice of election signed by said Commissioner.

(Consolidated Proceedings)

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO DISMISS APPEAL

CHARLES A. BRIND,
Attorney for Appellee,
Office & P. O. Address,
State Education Building,
Albany, New York.

BATAVIA TIMES LAW PRINTERS
BATAVIA, N. Y.

INDEX

PAGE

Pertinent Statutes 2

Statement of Facts 14

Argument 18

I. The Appeal is Not Timely 18

II. None of the Five Questions Purported to be Presented by the Appeal Herein are Before this Court 24

III. The Appeal Herein does not Present a Substantial Federal Question 32

1. Statutory Background 32

2. Events Leading to Appellee's Order 36

3. Effect of the New York State Statutes on the New Central School District 39

4. Prior Holdings of the New York State Courts Relating to the Constitutionality of Education Law, Section 1801 41

5. Prior Holdings of Federal Courts and the United States Supreme Court in similar cases. 42

Conclusion 47

Appendix A (Copy of Opinion of Brennan, J., in *Jenne et al. v. Spaulding*—not reported) 48

CITATIONS.

Cases

Attorney General, State of Michigan *ex rel.* Kies v. Lowrey, 199 U. S. 233 ..... 41, 44

Bianchi v. Morales, 262 U. S. 170 43

Bullen v. Wisconsin, 240 U. S. 625, 632 27

California Water Service *et al.* v. Redding *et al.*, 304 U. S. 252 43

PAGE

Chicago Railway v. R. R. Commission, 237 U. S. 220, 234 27
Cole *et al.* v. Norborne Land Drainage District, 270 U. S. 45 46
Daniman *et al.* v. Bd. of Ed., 348 U. S. 933; 352 U. S. 950 28
Defiance Water Co. v. Defiance, 191 U. S. 184 42
Delmar Jockey Club v. Missouri, 210 U. S. 324, 335 43
Department of Banking v. Pink, 317 U. S. 264 ..... 18, 19, 23, 24
Duignan v. U. S., 274 U. S. 195, 200 27
Federal Trade Commission v. Minneapolis-Honeywell Co., 344 U. S. 206 22
Gully v. First National Bank, 299 U. S. 109, 113 42
Hannis Distilling Co. v. Baltimore, 216 U. S. 285, 288 .. 43
Highland Farms Dairy v. Agnew, 300 U. S. 608 42
Hunter v. Pittsburgh, 207 U. S. 161 45
Kelly v. Pittsburgh, 104 U. S. 78 ..... 41, 44
Koster v. Turchi, 173 F. 2d 605 42
Laramie County v. Albany County, 92 U. S. 307 42
Lawn v. U. S., 355 U. S. 339, Rehearing denied 355 U. S. 967 27
Leonard v. Vicksburg S. & P. R. Co., 198 U. S. 416, 421 43
Levering & Garrigues Co. *et al.* v. Morrin, *et al.*, 289 U. S. 103 43
McGilvra v. Ross, 215 U. S. 70, 76, 77-80 43
McMillen v. Anderson, 95 U. S. 37 .....
Montana Railway v. Warren, 137 U. S. 348, 351 27
Mount Pleasant v. Beckwith, 100 U. S. 514 44
Myles Salt Co. v. Board of Commissioners, 239 U. S. 478 45
New Orleans v. Benjamin, 153 U. S. 411, 424 42
Newton v. Commissioners, 100 U. S. 548 43
Norton v. Whiteside, 239 U. S. 144 43
Old Jordan Mining v. Societi Anonyin Des Mines, 164 U. S. 261, 264 27
Pfister v. Northern Illinois Finance Corp., 347 U. S. 144 19

PAGE

San Pedro, etc. Co. v. U. S., 146 U. S. 120, 136 27
Securities & Exchange Commission v. Chenery Corp., 332 U. S. 194 46
Shanks v. Banting Mfg. Co., 9 F. 2d 116 42
Slochower v. Board of Higher Education, 348 U. S. 935; 350 U. S. 551; 351 U. S. 944 28
Wayne United Gas Co. v. Owens-Illinois Glass Co., 300 U. S. 131, 137 ..... 19, 22
Worcester v. Street Railway, 196 U. S. 539 42

Board of Education, v. Wilson, 277 App. Div. 809; aff. 303 N. Y. 107 41
Daniman *et al.* v. Board of Education—Shlakman *et al.* v. Board of Higher Education, 307 N. Y. 806 28
Franklin Bank Note Co. v. Mackey, 158 N. Y. 683 19
Gardner v. Ginther, 232 App. Div. 296; aff. without Opinion, 257 N. Y. 578 41
Monaco *et al.* v. Allen, *et al.*, 5 A. D. 2d 743; appeal as of right dismissed 4 N. Y. 2d 1032 41

Jenne *et al.* v. Spaulding (not reported) Appendix A ... 48

Statutes

Article XIV, Section 1, of the Amendments to the Constitution of the United States 25, 26, 27, 45
Article XI, Section 1, of the New York State Constitution 21
New York Civil Practice Act, Article 78 ..... 14, 15, 26
New York State Education Law, Section 314 ..... 13, 21, 31
New York State Education Law, Section 1801, subds. 1 and 2 ..... 2, 14, 25, 26, 28, 29, 30, 34, 41
New York State Education Law, Section 1804, subds. 5 and 6 ..... 3, 25, 29, 39, 41
New York State Education Law, Section 1805 ..... 5, 35, 39
New York State Education Law, Section 1806 ..... 6, 30, 40
New York State Education Law, Section 1514 ..... 12, 33
New York State Education Law, Section 1517 ..... 13, 33
New York State Education Law, Section 1518 ..... 13, 33

PAGE

New York State Education Law, Section 3202, subd. 2.. 37
Rule XX of the Rules of Practice of the Court of Appeals of the State of New York 19
28 U. S. C. § 1257 (2) .....
28 U. S. C. § 2101 (c) 18

Miscellaneous

84 A. L. R. 597, note VII 19
Carmody-Wait Cyclopedia of New York Practice, Vol. 9, page 405 19
Cohen and Karger on Powers of the New York Court of Appeals, Section 186 19
James B. Conant, The Child, The Parent and the State, p. 174-N. 6 34

IN THE

Supreme Court of the United States

October Term, 1959

No.

In the Matter of the Applications
of
The BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 3 of the TOWN OF OYSTER BAY, NASSAU COUNTY, and of JANE J. SERPE, GLORIA A. DUNAIF and IRIS E. LAVAC, Taxpayers of Union Free School District No. 3 of the Town of Oyster Bay, Nassau County,

Appellants,

For orders under Article 78 of the Civil Practice Act to review, vacate and set aside the determinations of JAMES E. ALLEN, JR., as Commissioner of Education of the State of New York,

Appellee,

(1) Laying out Central School District No. 3 of the Town of Oyster Bay, Nassau County, and (2) that an election shall be held for the purpose of organizing Central School District No. 3 of the Town of Oyster Bay, Nassau County, and vacating the notice of election signed by said Commissioner.

(Consolidated Proceedings)

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO DISMISS APPEAL

The Appellee, James E. Allen, Jr., as Commissioner of Education of the State of New York hereby moves to dismiss the appeal herein.

The grounds for appellee's motion to dismiss the appeal are as follows:

I. The appeal is not timely.

II. None of the five questions purported to be presented by the appeal herein are before this Court.

III. The appeal herein does not present a substantial Federal question.

The following sections of the New York State Education Law are pertinent to this cause:

Section 1801, subdivisions 1 and 2

"1. The commissioner of education is hereby authorized and empowered to lay out central school districts for the establishment of central schools to give instruction in elementary or elementary and high school subjects and to fix, determine and define the boundaries of said districts as hereinafter provided.

"2. The commissioner is authorized and empowered to make and enter in his office orders laying out territory in new central school districts or annexing to existing central school districts territory not contained within a city school district in a city having a population of more than ten thousand inhabitants, and not contained within a city school district having a full valuation of taxable real estate per public school pupil residing in the district of more than fifteen thousand dollars; provided, however, that no territory contained within a city school district in a city having a population of ten thousand inhabitants or less may be included in new central school districts or annexed to existing central school districts after July first, nineteen hundred fifty-five. The commissioner of education is authorized and empowered to make and enter in his office orders dissolving and annexing a central school district or districts to another central school district, pursuant to the provisions of subdivision two of section eighteen hundred two of this

chapter. The commissioner in laying out such central school districts and in fixing and defining the boundaries thereof shall include only territory of suitable size conveniently located for the attendance of pupils and having a sufficient number of pupils for the establishment of a central school. The commissioner shall designate all central school districts by name, number and such other description as he shall deem proper."

Section 1804, subdivisions 5 and 6

"5. Nothing herein contained shall be construed to deprive any existing school district of the property belonging to such district, or to affect the indebtedness of said district. An existing district within the meaning of this article shall be construed to mean a district that lies within the boundaries of a central school district. Each such existing district shall be deemed to continue to exist in law for the purpose of paying all its just debts, including obligations lawfully issued prior to the organization of such central school district, together with all interest thereon as the same shall fall due. In levying the annual school tax upon the property of such central school districts, the board of education shall also assess and levy upon the taxable property of each such existing district which has an outstanding indebtedness, an addition sum sufficient to pay all of such indebtedness which shall fall due during the school year for which the tax is levied less any sum received by such central school district and apportioned and credited to the existing school district pursuant to the provisions of subdivision four of section eighteen hundred six of this article."

"6. The board of education shall not sell or otherwise dispose of the property of any such existing district except with the approval of a majority of the qualified voters of such existing district present and voting upon the question at a meeting of such voters duly called by such board of education; provided, however, that upon the expiration of five years from the date of discontinuance of a school, pursuant to section one thousand eight hundred five of this chapter, the board of education may, in its discretion, without

a vote by such qualified voters upon such question, sell or otherwise dispose, in the manner provided by law, of such a school or other building previously used for school purposes and the real property on which it is situated. For that purpose the proceeds of such sale or disposal of property belonging to such existing district, after deducting the cost of repairs or improvements made after the organization of the central school district, shall be used for the payment of the portion payable by such existing district of any outstanding indebtedness of such existing district which shall be due and payable or which may thereafter become due and payable. Any balance remaining after the payment of such indebtedness shall be apportioned among the taxpayers of such existing district as they appear upon the last completed town or city assessment roll preceding the date of sale, unless the voters of such existing district by a majority vote of those present and voting at a special district meeting called for the purpose shall vote to turn over the proceeds of such sale or disposal of such property to the central district to be used for the benefit of the central district. Any balance of funds remaining in the treasury of the several districts included within the central school district on July first next following the date of the establishment of such central school district, after paying all outstanding obligations then due and payable, shall be turned over to the treasurer of the central school district within thirty days thereafter. That portion of the balance representing tax money in each district shall be apportioned among the taxpayers of the existing district as they appear on the last completed town or city assessment roll prior to July first of the first year the central school board levies a tax, unless the voters of an existing district by a majority vote of those present and voting at a special school district meeting called for the purpose, prior to August first following the date of the organization of the central school district, shall vote to turn over all the balance to the central district to be used for the benefit of the central district. That portion of the balance representing public money shall become available for use by the board of education of the central school district. If

the voters of the existing district do not authorize the transfer of the entire balance to the central school district it shall be the duty of the board of education of the central school district to allocate such balance to tax money and public money in the proportion that the average amount of the tax levied during the preceding five years and the average amount of public money apportioned during the preceding five years bear to the sum of these averages. The board of education shall refund the tax money so allocated to the taxpayers of each constituent district on or before the last day of the first year of operation as a central school district. The title to all property erected or otherwise acquired after the organization of such central school district shall be vested in the central district, irrespective of the location of such property."

Section 1805

"§ 1805. Limitation of powers of central school district

All central school district shall have the same powers and be subject to the same limitations that are now conferred or imposed by law upon union free school districts as provided by this chapter except that in each existing district maintaining a school at the time of centralization the central school district shall continue to maintain such school for the instruction of pupils therein up to and including the sixth elementary grade for a period, commencing on the day of centralization, of not less than five years, unless the legal voters of such existing district at a meeting of such voters duly called by the board of education of such central school district shall, by majority vote of those present and voting at such meeting, determine to discontinue the school in such existing district prior to the expiration of such minimum five year period and in such case the school shall be discontinued accordingly. At any time after the expiration of such minimum five year period the board of education of the central school district may, by a majority vote of the members thereof, discontinue such school in such existing district, provided, however, that in the event the legal voters of such

existing district shall have determined not to discontinue such school at a meeting of such voters duly called upon such question, the board of education of the central school district may not discontinue such school until after the expiration of a period of five years following such determination by such legal voters. The district officers of the several existing districts shall remain in office until August first next following organization of such central school district for the purpose of conducting and maintaining school in the several districts, the carrying out of contracts in force at the time of the organization of such central school district, of paying all just debts and obligations of such existing districts due and payable on or prior to said August first, and of levying and collecting taxes raised or necessary to be raised for any of said purposes. For the purposes of the apportionment and payment of public moneys, notwithstanding any other provisions of this article, any apportionments and payments made during the school year in which such central school district was organized shall be apportioned and credited to the existing districts. Any apportionments made and paid during the school year next succeeding the date of the organization of such central school district shall be made and credited to the central school district but the amounts thereof shall be determined upon the basis of the continuance of the existing districts as separate districts during the entire school year in which such central school district was organized."

Section 1806

"1806. State aid building quota

1. Any central school district organized under the provisions of this article shall from the time of its organization receive from the state, in addition to the apportionments provided in sections thirty-six hundred two, thirty-six hundred three, thirty-six hundred twenty-seven and forty-four hundred five of this chapter, an apportionment to be known as a building quota, the amount of which shall be determined according to the cost of the building, including site purchase,

grading and improvement of site, original furnishings and equipment, machinery and apparatus, professional fees and other incidental expenses, which cost shall be approved by the commissioner, as calculated in this subdivision, provided that any building quota established prior to July first, nineteen hundred fifty-five, shall continue to be computed and paid pursuant to the provisions of this chapter as in effect at the time of the establishment of such quota.

"a. For the purpose of calculating the building cost, which shall be known as the 'ceiling' the commissioner shall ascertain the number of pupils enrolled in grades one to twelve, inclusive, of the central school district, or, where a building quota is to be established during the first year of operation of the central school district, the number of public school pupils of the existing districts comprising such central school district, enrolled in such grades, at the close of the school year next preceding the date the work is commenced and shall add thereto, as a computed kindergarten enrollment, a number of pupils equal to the average number of pupils enrolled in grades one to six, inclusive, in such school districts. The pupil enrollment thus enumerated may be increased or decreased five per centum by the commissioner to compensate for school population trend in each central district just prior to the approval of a bond issue for a central school building.

"b. (1) Upon the basis of the pupil enrollment thus ascertained, there shall be computed for each pupil shown thereby the sum of twelve hundred dollars plus an amount not exceeding two hundred forty dollars per pupil on account of the cost of the site purchase, grading and improvement of site, original furnishings, equipment, machinery and apparatus, professional fees and other incidental costs approved by the commissioner, as a cost unit for buildings housing grades kindergarten through six, and the sum of sixteen hundred dollars per pupil plus an amount not exceeding four hundred dollars per pupil on account of the cost of such incidental expenses, as a cost unit

for buildings housing grades seven through twelve, provided, however, that the sum of sixteen hundred dollars shall be so computed without the additional allowance for such incidental expenses in case of such latter buildings if the district is scheduled for reorganization in accordance with the master plan for school district reorganization of the joint legislative committee on the state education system, as amended by the commissioner, and until such reorganization is accomplished. The pupil enrollment multiplied by the cost unit shall constitute the cost of the building in a central school district. The cost unit herein specified, except for the additional allowance for incidental expenses shall be based upon the cost of material and labor on July first, nineteen hundred fifty-five, and may be increased or decreased by the commissioner in proportion to the fluctuation in the costs of material and labor after July first, nineteen hundred fifty-five. Schedules indicating such fluctuations, expressed in percentage terms of increase or decrease in the basic cost unit of twelve hundred dollars or sixteen hundred dollars, as the case may be, shall be prepared by the state industrial commissioner monthly and delivered to the commissioner. (2) A building quota for additional construction in a district in which a building quota shall theretofore have been established shall be computed as follows: after computing the building quota pursuant to paragraph a and subparagraph (1) of paragraph b and paragraph c of this subdivision and after ascertaining the raw building quota percentage by dividing the building quota by the ceiling, all previous ceilings, or, where the costs allowed were less than such ceiling, such costs, shall be recomputed in terms of the dollar value of the cost unit as of the time of the establishment of the building quota for the additional construction. Such previous ceiling or such approved costs allowed, as so recomputed, shall be deducted from such ceiling in determining the final quota percentage for the additional construction. In the case of approved costs for building quotas established prior to May second, nineteen hundred forty-one, such costs shall be adjusted by multiplying them

by the ratio of the dollar value of the cost unit at the time of the additional construction to the dollar value of the cost unit as of May second, nineteen hundred forty-one

"c. The central school district shall contribute to the cost of the building and incidental expenses thus calculated, an amount equal to six per centum of the actual value of taxable property in the central district and the state shall contribute the remainder of such cost, thereby making the building quota to be apportioned and paid by the state the amount obtained by multiplying pupil enrollment by cost unit minus six per centum of the actual value of taxable property.

"d. Notwithstanding the provisions of paragraphs b and c of this subdivision, any central school district, for which a new building quota is to be established after July first, nineteen hundred fifty-five, and in which school construction has been or shall be approved pursuant to law and the general construction contract therefor awarded prior to July first, nineteen hundred sixty, shall have the right to have its building quota computed under the provisions of former section eighteen hundred six of this chapter as in effect on June thirtieth, nineteen hundred fifty-five and in the following manner:

"(1) A raw building quota percentage shall be computed as if construction had begun during the school year nineteen hundred fifty-four—fifty-five, using the enrollment as of the end of June of nineteen hundred fifty-four, the actual valuation used in the computation of regular state aid for the school year nineteen hundred fifty-four—fifty-five, and the dollar value of the cost unit as of June, nineteen hundred fifty-five:

"(2) thereupon a new ceiling shall be computed based upon the date on which construction actually began;

"(3) the ceiling so computed shall be the new ceiling, except in a district in which a building quota shall theretofore have been established, in which case the

ceiling so computed shall be used to determine the balance of ceiling. Such ceiling, or balance of ceiling, as the case may be, shall then be used to adjust the raw building quota percentage determined in accordance with subparagraph (1) of this subdivision.

"e. The actual value of taxable property shall be ascertained by taking the assessed valuation of such real property as it appears upon the last assessment roll of the town or city in which such property is located, after revision as provided by law, and by applying thereto the ratio, as determined by the state board of equalization and assessment, which such assessed valuation bears to the actual value of such property.

"f. The building cost as herein computed shall not prohibit a central district from exceeding the computed building cost, but any increase shall be borne by the local district.

"g. If a central school district decides to plan for only a part of the enrollment, either in a new building or in an addition to an existing building, the building formula shall be applied except that the local district and state shall contribute in terms of the ratio established if the entire enrollment had been planned. If the entire enrollment is not planned in the initial outlay, that shall not prohibit the district on some future date from receiving state assistance for various buildings or additions for the enrollment beyond the enrollment already cared for. Under no circumstances shall the state contribute more than its share that would result from the building formula prescribed in this subdivision.

"h. In the event that federal aid shall be granted to any school district in the construction of any school building, the amount of such federal aid shall not be included in the sum actually expended in computing the amount of such building quota.

"i. The building quota herein provided for shall be paid only on projects costing more than thirty-five hundred dollars and only in case the commissioner of

education shall approve the proposed erection, enlargement, remodeling or repair of school buildings in advance of the expenditure of the sum required therefor, and in case the plans and specifications for such erection, enlargement, remodeling or repairs shall be approved by him as provided by law.

"j. The board of education of such central school district shall cause to be presented to the commissioner of education, in the manner and at the time required by him, a statement as to the amounts expended by such district for the erection, enlargement, remodeling or repair of school buildings.

"2. In the event that a school district acquires a school building by gift or otherwise without cost to the district, and the plans and specifications of such building have been approved by the commissioner of education, such commissioner shall apportion to such district a building quota computed according to the building formula prescribed in subdivision one of this section as approved and determined by such commissioner. The board of education of such district and its successors shall hold such quota in trust, invest and reinvest the same in obligations of the state of New York, of the United States and or obligations of counties, cities, towns and villages of this state, which have not defaulted in the payment of any of their obligations, either as to principal or interest, within five years next preceding the investment and use the income therefrom for the care and maintenance of such school building and the school grounds upon which it is located.

"3. If the cost of the erection, enlargement, remodeling or repair of school buildings is paid out of the proceeds of bonds or other evidences of indebtedness issued as provided by law, such building quota shall continue to be paid, for the year for which the apportionment is made, on the basis of the amount of the principal and interest of such bonds or evidences of indebtedness paid by such district during such year, where it has so been paid on and before July first, nineteen hundred fifty-six; provided, however, that in

all other cases the apportionment of such building quota based on bond or capital note issues, shall be paid during the school fiscal year in which the installment of principal and interest on which such quota is based falls due. Receipts from the building quota shall be applied first to the payment of the principal and interest which becomes due on such bonds in the year in which the quota is received.

"For the purposes of this section the payment of bond anticipation notes made by a central school district from a budgetary appropriation shall, for the apportionment of such building quota, be deemed to be a payment of bonds in anticipation of which the said notes were issued, providing that the total amount of bonds issued and sold by such central school district shall be reduced by an equivalent amount.

"4. There shall also be paid to each central school district containing a school district which continues to exist after becoming a part of such central school district, pursuant to the provisions of section eighteen hundred four of this chapter, for the purpose of paying any outstanding indebtedness incurred by it prior to July second, nineteen hundred forty-seven, a sum of money equal to the amount necessary to pay such indebtedness of such school district, including interest, which shall fall due during such school year, less two mills on each dollar of actual valuation of the taxable property in such existing district. The first payment to central school districts hereafter organized shall be made for and during the first school year for which the board of education of the central school district levies a tax. The central school district shall apportion and credit to the existing school district the sum so received."

Section 1514

"§ 1514. Property of districts consolidated

"When two or more districts shall be consolidated into one, the new district shall succeed to all the rights of property possessed by the annulled districts."

Section 1517

"§ 1517. Indebtedness of certain dissolved districts

"Whenever any school district is dissolved pursuant to the provisions of section fifteen hundred five of this article and annexed to an adjoining district or adjoining districts or consolidated as provided in section fifteen hundred twelve, the indebtedness of any such district evidenced by bonds or notes or relating to school building construction shall thereupon become a charge upon the enlarged district formed by such annexation or consolidation. The board of education or trustees of such enlarged district shall raise by tax an amount sufficient to pay any such indebtedness of such district as the same shall become due."

Section 1518

"§ 1518. Continuance of dissolved districts for payment of debts

"Though a district be dissolved, it shall continue to exist in law, for the purpose of providing for and paying all its just debts, except as provided in section fifteen hundred seventeen; and to that end the trustees and other officers shall continue in office, and the inhabitants may hold special meetings, elect officers to supply vacancies and vote taxes; and all other acts necessary to raise money and pay such debts shall be done by the inhabitants and officers of the district."

Section 314

"§ 314 Master Plan For School District Reorganization

"The commissioner of education is hereby authorized to continue the investigations, study and review carried on by the joint legislative committee on the state education system in order to bring up to date the Master Plan For School District Reorganization (legislative document number twenty-five of nineteen hundred forty-seven); to make such studies and surveys as are necessary to review periodically and main-

tain such plan currently; to hold hearings in relation to affected areas for the purpose of eliciting the expression of opinion, cooperation and assistance of the inhabitants of such areas; and to make recommendations for school district reorganization so as to assure the most efficient and economical provision of educational facilities for such areas. Such recommendations shall be principally directed toward the reorganization of areas in and around the city school districts of cities having less than one hundred twenty-five thousand inhabitants, the reorganization of the remaining common and union free school districts not included in such urban and suburban areas and the reorganization of the smaller central school districts. The commissioner of education is hereby authorized, further, to amend such master plan as established by such joint legislative committee on the basis of his investigations, study and review, by orders made by him and entered in his office. Nothing herein contained shall delay, or interfere with, the exercise of the powers of the commissioner of education vested in him by articles thirty-seven or forty or sections fifteen hundred twenty-four, fifteen hundred twenty-five or fifteen hundred twenty-six of the education law."

Statement of Facts

Originally two proceedings were brought herein under Article 78 of the New York Civil Practice Act. The first proceeding *and the only one involved in this appeal* was for an order seeking to set aside an order of appellee, Commissioner of Education, *laying out Central School District No. 3 of the Town of Oyster Bay, Nassau County, as a central school district*, said order, dated March 29, 1957, being issued pursuant to Section 1801 of the New York State Education Law. This order included Union Free School District No. 3 (hereinafter referred to as "Brookville"), which is one of the petitioners herein; Union Free School District No. 4, and Union Free School District No.

6. All three districts are located in the Town of Oyster Bay, Nassau County, Long Island, and form a contiguous and compact area.

The second proceeding under said Article 78 of the New York Civil Practice Act had the purpose of setting aside the order of the appellee, Commissioner of Education, *calling the election of the qualified voters of the newly laid out Central School District No. 3* for the determination of the voters as to whether or not they wished to approve the establishment of said Central School District. This proceeding dealt purely with a matter of interpretation of State law and has no bearing on the appeal.

The said two proceedings were subsequently consolidated.

The election of the qualified voters of said Central School District No. 3 was later held on May 4, 1957, and resulted in a vote of 1864 in favor and 519 opposed.

The consolidated proceeding resulted in a decision in favor of appellee, on that part of the consolidated proceedings here pertinent, at Albany County Supreme Court, Special Term, September 5, 1957. Appellee was reversed on the second part of the consolidated proceedings, which is not here pertinent, at the same time.

Cross-appeals were filed by both parties to the Appellate Division of the New York State Supreme Court, Third Judicial Department, which resulted in a unanimous affirmance of the Special Term determination in favor of appellee, in that part of the consolidated proceedings which is here pertinent. As to the other part, the Appellate Division reversed the determination at Special Term, so that at this stage both proceedings were determined in

favor of appellee. The decision of the Appellate Division was rendered in July, 1958 (6 A. D. 2d 316).

The said decision of the Appellate Division of the New York State Supreme Court, in turn, was affirmed by the New York State Court of Appeals, without opinion, on May 29, 1959, two Judges dissenting on procedural grounds (6 N. Y. 2d 871).

In the meantime a number of applications were made by appellants herein for intermediate stay orders, which, however, were not granted, except that the Justice at Special Term, prior to his own decision, granted a limited interim stay, which, however, allowed the election on the question of the establishment of the central school district to take place.

After the final determination of the State Court of Appeals on May 29, 1959, appellants herein made a motion in said State Court of Appeals for reargument and for an amendment of the remittitur of the State Court of Appeals, so as to show that a Federal question had been involved and was necessarily passed upon in the said State Court of Appeals.

This motion of appellants herein, insofar as it sought reargument was denied by the State Court of Appeals on July 8, 1959 (6 N. Y. 2d 983, 999).

Insofar as the motion sought an amendment of the remittitur, the State Court of Appeals on July 8, 1959 granted the motion and added the following language:

> "Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, *viz.:* Appellants *contended that section 1801 of the Education Law was unconstitutional* in that it deprived taxpayers of their property

without due process of law in violation of the Fourteenth Amendment. The Court of Appeals held that said section was constitutional and that appellants' constitutional rights were not violated." (Emphasis supplied)

Furthermore, following the final determination of this cause by the New York State Court of Appeals, a proceeding was commenced by appellants herein to resettle the order of the Supreme Court, Special Term, making the order of the State Court of Appeals that of the State Supreme Court (in relation to eliminating from said order reference to the *vacatur* of a previous lower Court stay order—see *supra*).

After argument this order was made, eliminating the said *vacatur*. Thereafter contempt proceedings were brought by appellants herein against appellee, *et al.*, for allegedly violating the interim stay order of the Supreme Court, Special Term. This proceeding was argued on July 24, 1959 and was decided at Special Term on July 27, 1959 in favor of appellee.

Thereafter appellants herein sought a stay order from Judge Van Voorhis of the New York State Court of Appeals, which was argued on July 30, 1959 and decided in favor of the appellee on the same date.

Immediately thereafter appellants herein sought a stay order from a Justice of this Court, which was decided by Mr. Jusfice Harlan in favor of appellee in August, 1959. Subsequently, on October 6, 1959, appellants herein made and served their notice of appeal herein to this Court.

It will be noted that the notice of appeal is dated on a day 130 days later than the final determination of the State Court of Appeals.

ARGUMENT

I.

The appeal is not timely.

The appeal was not commenced within the time prescribed by statute. The appellant has 90 days from the date of the final order and judgment of the highest Court of the State of New York in which to commence an appeal to the United States Supreme Court under 28 U. S. C. 2101 (c). The order and judgment of the State Court of Appeals appealed from herein was made by the said Court of Appeals on May 29, 1959. Thus, the time for the appellants to appeal to this Court commenced on May 29, 1959. The notice of appeal herein was received by the appellee on October 7, 1959, which was more than 90 days from May 29, 1959, *i.e.*, 130 days thereafter, or 40 days beyond the expiration of this statutory period.

Appellants seem to assume that the 90-day period for filing a notice of appeal to this Court was tolled by their motion dated June 25, 1959, in the State Court of Appeals for reargument of the appeal which was determined originally by the said Court of Appeals on May 29, 1959. The said motion for reargument was denied on July 8, 1959, and the motion for amendment of the remittitur so as to show the presence of a Federal question was granted on the same day, *i.e.*, July 8, 1959.

The time to appeal to the United States Supreme Court commences to run, in the case of an appeal from a final order of the Court of Appeals of the State of New York, on the date of the final order and judgment of the Court of Appeals which is sought to be appealed from (*Department of Banking v. Pink*, 317 U. S. 264).

In the State of New York there is no period prescribed by statute or rule for the filing of a motion in the Court of Appeals for reargument of a matter previously determined by the Court of Appeals. Such motion can be made at any time after the Court of Appeals makes its final order and judgment. (*Franklin Bank Note Co. v. Mackey*, 158 N. Y. 683; Rule XX of the Rules of Practice of the Court of Appeals of the State of New York; Cohen and Karger, on Powers of the New York Court of Appeals, § 186; Carmody-Wait Cyclopedia of New York Practice, Vol. 9, Page 405; 84 A. L. R. 597, note VII.)

It has been held that a *timely* motion for reargument or rehearing will toll the running of the time to appeal to the United States Supreme Court (*Department of Banking v. Pink, supra; Pfister v. Northern Illinois Finance Corp.*, 317 U. S. 144). It has also been held that the filing of an *untimely* petition for rehearing or reargument if denied does not operate to extend the time to appeal (*Wayne United Gas Co. v. Owens-Illinois Glass Co.*, 300 U. S. 131, 137).

Since there is no statutory period for filing a motion for reargument in the Court of Appeals in the State of New York, there actually is no such thing as a timely or untimely petition for rehearing. It would seem, therefore, that a motion for reargument in the Court of Appeals, if not granted by the Court of Appeals, should not be deemed to extend the time to appeal to this Court.

It is to be noted further that the motion for reargument was based entirely on appellants' statement that "until [the] determination by [the New York Court of Appeals, appellants] did not know the basis for the Commissioner's determination." This argument had been presented below.

however, and the Appellate Division of the New York State Supreme Court, Third Judicial Department, unanimously had disposed of the same as follows:

> "The answer interposed by the Commissioner in our view is a sufficient pleading. Although petitioners argue that there is no allegation that the Commissioner considered the detailed statistical and fiscal studies and projections attached to the answer in making his determination, his pleading with respect of the most detailed of them is that they were 'studies made by the respondent', which means he made them, or as head of the department, had them made for his use, which amounts to the same thing. We are of opinion that the determination of the court at Special Term dismissing this portion of the petition as now consolidated was correct."

The Special Term determination referred to was in pertinent part as follows:

> "The studies made by the commissioner furnish ample support for the finding implicit in his determination that the size of the area and the number of pupils therein, present and prospective, are suitable and sufficient. 'The geography of the area and the means of communication existing therein establish reasonable basis for a finding that it is conveniently located for the attendance of pupils.' These determinations were for the commissioner to make. Absent a showing that they are arbitrary or capricious, the court may not interfere."

The New York Court of Appeals affirmed by a vote of five to two the affirmation by the Appellate Division of this determination.

It is patent, therefore, that appellants knew from at least the time of the Special Term decision, *i.e.*, September 5, 1957, what the basis of appellee's determination was. Hence, the grounds of their motion for reargument in the New York Court of Appeals had already been argued

before and passed upon by three Courts and presented no new matter. In fact, appellants' allegations in this respect seem wholly unsupportable. As was pointed out in the State Courts, there is no dispute on the facts involved in this case, since all the pertinent factual materials are matters of public record, such as the number of pupils in the area laid out by appellee as a central school district, the number of pupils of each of the component districts of the centralization attending public schools and those attending non-public schools; the valuation of taxable property of the area; the need of the community in general for the construction of school facilities; available highways, absence of natural barriers; the fact that appellee's order merely combined certain existing school district without a change in the pre-existing boundaries, and many others; that all of the Village of Old Brookville, with the exception of a tiny segment thereof, which latter part is a part of "Brookville" (a district included in appellee's order), is now a part of another central school district. That the State Constitution requires by Article XI, § 1, that every school child in the State be provided with a school system where he may attend without the payment of tuition; that the State policy since 1925 has been to provide central school districts for all nonurban areas, so that the constitutional mandate may be carried out with the maximum possible equality of educational opportunity for the youth of the State as between urban and nonurban areas; that by Section 314 of the State Education Law appellee has been charged with the duty to initiate "the reorganization of the remaining common and union free school districts * * *." Appellants are charged with knowledge of the State law and policy; that in fact all the foregoing were facts and circumstances well known to appellants from the inception of this litigation.

It would appear that the reasoning of this Court in *Federal Trade Commission v. Minneapolis Honeywell Co.*, 344 U. S. 206, together with the holding of this Court in *Wayne United Gas Co. v. Owens-Illinois Glass Co., supra,* would be governing. There must be an end to litigation, and there must be definite time limits upon which litigants may depend. If a person wishes to appeal a final order of the Court of Appeals to this Court, such person should pursue his remedy expeditiously and file the notice of appeal within 90 days of the final order. If such person does not do so, but instead files a motion for reargument, the words of this Court are applicable: "A defeated party who applies for a rehearing and does not appeal from the judgment or decree within the time limited for so doing, takes the risk that he may lose his right of appeal, as the application for rehearing, if the court refuse to entertain it, does not extend the time for appeal."

It is respectfully submitted that in New York, where a person is unsuccessful in a matter finally determined by the Court of Appeals, such person should, if he wishes to appeal to this Court, file his appeal within 90 days of such final order, or in the alternate file an application for reargument in the Court of Appeals, knowing full well that if the motion for reargument is denied that the filing of such motion for reargument does not extend the time for taking an appeal to this Court.

If the appellant is successful in his contention that this appeal is timely it will lead to a situation where an order and judgment of the Court of Appeals can always be appealed to this Court, even 100 years later, by merely filing with the Court of Appeals an application for reargument and upon the denial of such application or dismissal of the motion the person would have 90 days thereafter in which

to appeal to this Court. Here appellee made an order laying out a central school district on March 29, 1957 and the voters thereof voted to establish such central school district on May 4, 1957, by a vote of 1864 against 519, and the matter is still held up because of this litigation. The Constitution of the State of New York requires the Legislature provide for a continuously operating system of public schools and the interest of our school children requires that there be a known termination date of the litigation here in question. Delay serves no one; harms our youth. All parties are entitled to know and rely upon the final determination of the courts without there being a perpetual question of the right to appeal this matter. In sum:

(a) Reargument is purely discretionary with the New York State Court of Appeals under New York State law;

(b) The final order and judgment of the Court of Appeals had already fully adjudicated the matter after three main arguments and three decisions before three different Courts, and the same allegations had been urged upon all these Courts over and over again.

Hence, the order of the Court of Appeals must be considered to be final within the *per curiam* exposition of the applicable principle by this Court in the *Pink* case, *supra*, page 268. Consequently, in spite of the motion for reargument in this case, the time to appeal to this Court must be considered to run from May 29, 1959, and the appeal herein, consequently, is not timely.

2. Insofar as appellants' motion sought an amendment of the remittitur, the same was granted. The New York State Court of Appeals amended the remittitur as set forth in the Statement of Facts, *supra*.

It is well established that an amendment of a remittitur of the New York State Court of Appeals does not extend the time to appeal to this Court, inasmuch as such an amendment merely explains what the determination of the Court of Appeals actually was without in any way challenging, or interfering with, the finality of the Court's decision. The granting of such a motion involves no reconsideration of the case. It merely certifies that a stated Federal question had been presented and passed upon, without in any way suspending the finality of the decision of the Court of Appeals (*Department of Banking v. Pink, supra*). Consequently the granting of the motion to amend the remittitur does not toll the 90-day period for appeal to this Court.

It is respectfully submitted, therefore, that the appeal herein is not timely and must be dismissed *on that ground alone*.

II.

None of the five questions purported to be presented by the appeal herein are before this Court.

While it is appellee's position that POINT I, *supra*, fully disposes of the appeal herein, this point of argument shows additional reasons why none of the questions sought to be raised by appellants are even before this Court in any event, even if they had been raised in a timely fashion.

The remittitur of the Court of Appeals herein was amended on the motion of appellants herein so as to show that a Federal question was presented to, and necessarily passed upon by the New York State Court of Appeals. The amendment added the following language:

> "Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, *viz.*: Appellants contended that *section 1801 of the Education Law was unconstitutional* in that it deprived taxpayers of their property without due process of law in violation of the Fourteenth Amendment. The Court of Appeals held that *said section was constitutional* and that appellants' constitutional rights were not violated." (Emphasis supplied)

Appellants must rely on this language of the amended remittitur in order to convey jurisdiction to this Court in the present cause. It follows that this Court's jurisdiction herein is limited by the language of the amended remittitur.

Hence, the sole question which would be before this Court if the appeal herein had been timely would be whether or not the Court of Appeals erred when it declared Section 1801 of the New York State Education Law to be not in violation of the Fourteenth Amendment to the United States Constitution, in that it does not, contrary to said Amendment, deprive the taxpayers of that district of their property without due process of law.

Appellants, however, now seek to raise five questions which are patently not covered by the language of the amended remittitur.

The gist of these five questions is as follows:

"(1) Does *Article 37* of the New York Education Law *(not Section 1801, as stated in the amended remittitur)* violate the due process clause of the Fourteenth Amendment, because Section 1804, subdivision 5, thereof provides that the component school districts in a central school district retain both their property and their debt?

(2) Does *Article 37* of the New York Education Law *(not Section 1801, as stated in the amended remittitur)* violate the due process clause of the Fourteenth Amendment, because *the article* does not set forth standards adequate to guide appellee in exercising the administrative power granted to him thereunder?

(3) Does appellee's action in *initiating* the establishment of this central school district (consummated by the later vote of the voters of the district) violate the Fourteenth Amendment, because the "majority of the taxpayers" in appellants' district (a component of this central district) oppose its inclusion therein, and because appellee never made any "findings of fact", or held a trial in the matter, and because appellee never explained his reasons for so doing, in detail, to appellants personally, even though none of these things are required under the New York statutes, and even though all the factual materials on which appellee's action was based are matters of public record?

(4) Is *Article 37* of the New York Education Law *(not Section 1801 thereof, as stated in the amended remittitur)*, together with Article 78 of the New York Civil Practice Act (the constitutionality or unconstitutionality of which was never even referred to by appellants in any State Court, much less questioned by them there), in violation of the due process clause of the Fourteenth Amendment, because "*they impose a tax* upon the individual appellants" (emphasis supplied), even though neither said Article 37 nor, certainly, said Civil Practice Act imposes a tax on anybody—taxation being imposed, on the basis of action of the qualified voters of the central school district having established such central district, by the board of education of said central district, including representation from

appellants' district, through at least one member of such board of education, and because of the alleged inability of appellants to controvert non-existent "assumption of fact", even though the record shows that all factual materials involved are matters of public record, and even though the State Courts at all three levels held that there were no questions of fact involved in this litigation?

(5) Is the due process clause of the Fourteenth Amendment violated because appellants never had a trial upon non-existing questions of fact, where all three levels of the State Courts held that there were no questions of fact involved in this litigation, and where all factual materials on which appellee based his action in *initiating* the reorganization procedures, are shown by the record to be matters of public record (such as school district boundaries, pupil population, assessed valuations, absence of high school facilities, etc., etc.)?

As the record and particularly the amended remittitur of the New York Court of Appeals show, none of these questions were before the State Courts.

It is well established that questions which were not before the State Courts cannot be raised, for the first time, on a review of the determination of the State Courts. (*Chicago Rwy. v. Railroad Commission*, 237 U. S. 220, 234; *Bullen v. Wisconsin*, 240 U. S. 625, 632; *Montana Railway v. Warren*, 137 U. S. 348, 351; *Old Jordan Mining Company v. Societi Anonym Des Mines*, 164 U. S. 261, 264; *Duignan v. U. S.*, 274 U. S. 195, 200; *Lawn v. U. S.*, 355 U. S. 339; *San Pedro, etc. Co. v. U. S.*, 146 U. S. 120, 136).

In a very recent series of decisions this Court has once again reaffirmed this general rule, and in a manner completely apposite to the cause here at bar.

The New York Court of Appeals in two related proceedings (one against the Board of Education of the City School District of the City of New York, and the other against the Board of Higher Education) denied a motion for amendment of its remittitur so as to show that certain Federal questions had been raised, except as to one member of one of the two groups of appellants there involved (Slochower, who was a member of the Shlakman group, in the proceeding against the Board of Higher Education). As to him alone an amendment of the remittitur was granted by the Court of Appeals to the extent indicated at 307 N. Y. 806. The remittitur had not been amended as to any member of the Daniman group (Board of Education), and consequently an appeal by the Daniman group was dismissed for lack of a properly presented Federal question, at 348 U. S. 933. A subsequent motion for leave to file a petition for rehearing was denied and the appeal dismissed for lack of jurisdiction, at 352 U. S. 950, in relation to the same Daniman group. As to Slochower, however, in relation to whom the remittitur had been amended, this Court noted probable jurisdiction, at 348 U. S. 935, and ultimately reversed the New York Court of Appeals order, at 350 U. S. 551.

It is respectfully submitted, therefore, that even if the appeal herein had been timely, the questions numbered "(1)", "(2)", "(3)", "(4)" and "(5)" on pages 5 and 6 of the Jurisdictional Statement herein are not before this Court.

Appellants claim that the mention of New York State Education Law, Section 1801, in the amended remittitur opens the door to bringing in the constitutionality of any of the ten sections of the article, of which Section 1801 happens to be the first section, *i. e.*, "Section 1801" should be read to mean "Article 37".

It is respectfully submitted that the New York Court of Appeals is fully capable of expressing itself concisely and accurately, and that the language used by that Court may not be extended beyond its plain and unambiguous meaning.

The first two questions are not before the Court, because they seek to raise the constitutionality of sections of the New York State Education Law, *other than Section 1801 thereof, i.e.*, the constitutionality of Sections 1802 through 1809, which the New York Court of Appeals did not consider. The remittitur refers only to Section 1801 l.c.

The first such question is particularly addressed to Section 1804, subdivision 5. That is the provision which states that the property of all component districts ("existing districts") in a central school district is retained by such component districts after centralization. It is the same subdivision which also provides for the payment of the bonded indebtedness by the component districts, after centralization. It is the following subdivision (§ 1804, subd. 6) which requires that, upon sale of the property of a component district, the proceeds must be used first to pay up any outstanding bonded indebtedness of such component district.

Appellants conveniently slide over any specific reference to said Section 1804 by the simple method of referring to "the centralization provisions of the New York State Education Law (§ 1801, *et seq.*) * * *". (Emphasis supplied).

The fact remains, however, that the New York Court of Appeals, according to its own statement in the amended remittitur, did not consider the constitutionality of Section 1804, but merely that of Section 1801. Hence, this

first question sought to be raised is not before this Court even if it had been raised in a timely fashion.

The second question, sought to be raised, suffers from the same defect. The reference, again, is to "Section 1801, *et seq.*", and, therefore, goes far beyond its proper limits.

The language used would, for instance, include any administrative action of appellee based on *Section 1806*, which deals with the State aid building quota, payable to central school districts from New York State funds. No such question was before the State Courts, of course.

It is admitted, however, that this second question here sought to be raised, (1) if the reference were limited to Section 1801 of the State Education Law, (2) if it had been raised on a timely appeal, and (3) if it were not precluded by previous decisions of this Court, would be a proper reflection of the remittitur of the New York Court of Appeals, and hence would be properly before this Court.

Appellants summarize the last three questions into a single question at page 18 of the Jurisdictional Statement as follows:

> "(3) Have appellants been deprived of their property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States by reason of their being deprived in this proceeding of a hearing upon the issues of fact raised by the pleadings in that the Commissioner ordered centralization without a hearing of any sort, without making any findings of fact, and without otherwise revealing to petitioners the facts upon which his determination rested, and in that the statutes in questions as applied in this proceeding impose a tax upon the individual appellants but at the same time prohibit them from controverting assumptions of fact on which that tax rests."

It must be noted in this connection that all three State Courts held that there was no question of fact presented by the record. It is assumed that the question whether or not questions of fact are presented in any given litigation is also deemed a question of fact and must, consequently, be deemed to be conclusively settled by the determination of the highest State Court, to the exclusion of the jurisdiction of this Court. In any event, no Federal question is presented in this connection. Nor is a Federal question presented by appellants' allegations that "assumptions of fact" were made by appellee, which allegations are not borne out by the record.

It must be remembered that all the factual materials on which appellee based his determination are indisputable matters of public record, such as school district boundaries, number of pupils enrolled, existing facilities, birth records, taxable values, roads, distance between various points in the area and other similar matters. The only dispute in such case can relate to the conclusions to be drawn from such factual materials. The statutory discretion to make such conclusions rests in appellee, and hence such disputes merely raise questions of law.

Nor is a Federal question presented based on appellants' allegations that "they did not know" the basis for appellee's order. As indicated hereinabove, appellants are charged with knowledge of the law, inclusive of Section 314 of the State Education Law which charges appellee with initiating school district reorganizations found by him to be necessary in the educational interest of the children of the area involved. Appellants also know that the record herein contains various items returned by appellee, setting forth various details upon which appellee's determination was based. The State Courts properly passed on

appellants' contention, which can hardly be taken seriously, that in spite of appellee having made and caused to be made such studies of matters of public record, that he did not rely upon the same in making his determination.

It is, therefore, respectfully submitted that none of the five questions sought to be presented on this appeal, even if the appeal had been timely, are before this Court, in any event, and that the appeal must be dismissed, on this ground as well.

III.

The appeal herein does not present a substantial Federal question.

It is respectfully submitted that even if this appeal had been brought in a timely manner, and even if all five questions listed by appellant were properly before this Court, the finding of any substantial Federal question is foreclosed by a multitude of prior decisions of Federal Courts, and particularly of this Court, which have already determined all issues purported to be raised herein by appellants.

1. Statutory Background

The school districts of the State were first established in 1812. As education became more complicated, and included more and more fields of subject matter, it became obvious that the originally very small school districts, of which there were over 11,000 in the State around the middle of the last century, were inadequate as bases for proper local educational programs, both from the standpoint of sufficiency of the tax base and from the standpoint of

the sufficiency of the number of pupils to allow a broad program on an economical basis. Hence in 1853 the so-called Union Free School District Act was passed, which authorized *consolidation* of several common school districts to form a union free school district for the purpose of establishing and operating a high school. The principles underlying this legislation were to the effect indicated today by Education Law, Sections 1514, 1517 and 1518. Under these provisions in the case of *consolidation*, the entire property of all component districts spreads to the newly formed union free school district as does all bonded indebtedness, while only current bills such as for coal and other supplies have to be paid by the individual component district. This system, however, proved inadequate to the needs, because obviously a district which had good facilities was not agreeable to consolidation with a district that did not. Similarly, a district which had no bonded indebtedness would not wish to consolidate with a district or districts which had a high bonded indebtedness which was to spread over the entire new district and which, therefore, the debt-free district had to assume in part. As a result of this, comparatively very few such union free school districts were actually established. Consequently, at the beginning of the current century various new schemes for school district reorganization were contemplated and tried, with the result that the present central school district provisions (*"centralization"*) finally became the accepted standard for school district reorganization in this State.

Since 1925 over 96% of the nonurban area of the State has been reorganized into over 500 central school districts, resulting in the reduction of the then about 10,000 school

*districts of the State to just over 1300**. Beginning in 1925, also, a great deal of additional State aid was granted to these central school districts as an incentive to their formation. Only central school districts, for instance, receive a so-called State aid building quota, under which, depending on the wealth of the district, a new central school district may receive up to 60% and 80% of its building costs through direct State aid. This aid is in reverse proportion to the wealth of the district. It was both this and various other substantial additional state aid grants and the feature of the central school district law which allowed the component school districts to retain title to all their property, but at the same time also required them to pay all indebtedness themselves by an additional levy over and above the current central school district operating levy, which have been so successful, through its reorganization program, in bringing the New York State School System to the forefront of quality in the United States.†

The retention of property rights of the component districts in their schools and other facilities results in a situation where, upon the sale of such buildings and facilities, the proceeds must be used first to pay up existing bonded indebtedness of the component districts and any remainder of such proceeds must be reapportioned to the taxpayers

* While it is realized that this is not an argument on the law, it must, nevertheless be pointed out, as a practical matter, that a finding of unconstitutionality of Education Law, § 1801, under which this vast percentage of the New York State School System has been reorganized over so many years, would create the gravest possible problems relating to the many millions of dollars of all central school district bond issues and tax levies over the years, the re-creation of all the old component districts, the entire educational programs in the central districts, title to all central school district properties and a multitude of other related matters.

† Cf. The Child, The Parent and The State, James Bryant Conant, p. 174, n. 6.

of the component school district, unless *they* vote to turn such remainder over to the central school district for central school district purposes. It will be noted thus that while the components who have bonded indebtedness must pay such indebtedness themselves, at the same time they also retain title to all their property, which may not be disposed of by the central school district, except with the consent of the voters of the component district. In fact, under Section 1805, the schools of the component districts which are in operation at the time of centralization may not even be closed except with an approving vote of the voters of such component district.*

It is obvious that for a good program and one that can be sustained by the taxpayers, it is necessary that a certain number of pupils is required so as to insure the required variety of educational offerings, and further that enough taxable wealth be available so as to make the provisions of such programs economically feasible.

The process of reorganization is, of course, often opposed by taxpayers of high value areas who do not wish to participate in the problems of the larger community of which they, nevertheless, are a part.

The State Constitution makes it mandatory that every child be provided an education system in which he may be educated at public expense. This is so regardless of whether there are many or few pupils involved. Also, it would be administratively impossible to operate a State Education System in which there are left islands of high valuation or islands of areas with few pupils, while the rest of the State must carry the burden of educating their

* Under recent legislation a central district now may close such schools five years after centralization or five years after the last vote of the voters of the component district not to close such schools.

own children as well as those of such islands. This is essentially the position of appellants. They contend that because they have only 20 pupils in Grades 9 through 12, although they have an additional number of pupils in the 7th and 8th Grades which are high school grades, and because their valuation is comparatively high, that they are immune to the Constitution of the State of New York and immune to the process of school district reorganization.

2. Events Leading to Appellee's Order

Appellee's order was made in the regular course of the customary procedures leading to reorganizations for the establishment of central school districts.

The situation in Long Island, particularly, is becoming more and more acute because of increases in population. This suburban area is absorbing more and more people moving out of New York City. As a result thereof, the shortage of classrooms and other school facilities is increasing. Against this background and in line with these tendencies in this specific area, the reorganization problems of this group of school districts was studied and evaluated by appellee. The customary pattern of field trips, correspondence, conferences locally and in Albany were had, the financial situation was carefully evaluated in relation to resources and possible patterns of programs. The enrollment situation was carefully studied with the same purpose in mind. The geography of the three districts in question provides a compact and contiguous territory lending itself well to the establishment of a central school district out of the three districts in question.

"Brookville" lies between a presently existing central school district and the other two districts in this group

which are particularly in immediate need of school facilities for all students. Hence, to exclude "Brookville" from this reorganization would leave a gap or an "island" and, in addition, would fail to accord proper consideration to the 20 pupils residing in "Brookville" who do attend the public high schools between Grades 9 and 12.

"Brookville" admittedly has 20 students in Grades 9 through 12 now attending public schools. To these must be added those students in Grades 7th and 8th, which are also high school students, and for which "Brookville" now provides through an 8th Grade program. Even though 20 students in Grades 9 through 12 are a small number compared with the students in that category in the other two districts, nevertheless even a small number of students is constitutionally entitled to a free public school education and, likewise, even a small number of students will have trouble finding places in districts other than those of residence, in view of Education Law, Section 3202, subdivision 2, which provides that a school district is authorized, but not required, to accept nonresident students and even then only on such terms as the local board of education may see fit to require. Appellee's responsibility goes to all children of the State, whether their specific numbers are small or large. There was nothing unusual about the procedure by which this centralization was initiated by appellee under the statutory provisions applicable. It is not unusual to have high valuation areas included with low valuation areas in reorganizations. This, indeed, becomes necessary if the area otherwise forms a natural part of a community, unless high valuation areas are to be omitted throughout the State from all school district reorganizations because of their valuation alone. This, obviously, could not be done on any basis.

Appellants allege that appellee "admitted" to have used non-statutory standards in his studies and other materials returned herein. There is no basis for such an allegation. The statutory standards are to the effect that appellee is to include "only territory of suitable size conveniently located for the attendance of pupils and having a sufficient number of pupils for the establishment of a central school."

The items referred to in appellee's studies and return comprise the details for the criterion "of suitable size" which, quite obviously, is not limited to acreage, but must also include such matters as valuation, population, density, communications systems, etc. Other items therein refer to the question of "convenient location for attendance of pupils" and "sufficient number of pupils". It is, on the contrary, the contention of appellee that the materials returned herein were in direct support and explanation of, and in compliance with, the said statutory standards.

It is respectfully submitted that appellee used every possible care, diligence and his best judgment under the statutory procedures, and in full compliance therewith, in order to arrive at the best possible solution for the provision of educational facilities for this community.

In this connection it should further be pointed out that appellants' allegations as to a "watering down" of educational offerings in "Brookville", "disruption" of "Brookville's" educational system and the like are purely speculative and have no basis in established fact. In this connection, Judge Brennan's Opinion is apposite when he says:

> "It is also uniformly recognized that 'A genuine and present controversy, not merely a possible or conjectural one must exist—' to sustain jurisdiction. Gully v. First National Bank, 299 U. S. 109, 113 [;] Koster v. Turchi, 173 F. 2nd 605."

3. Effect of the New York State Statutes on the new Central School District

It is an indisputable fact that none of the three districts included in this reorganization has its own high school facilities. The purpose of a reorganization of this type is mainly to provide high school facilities of its own for the community.

Appellants complain of "disruption of its educational system" and similar conjectural matters. These must be viewed against the New York State statutes under which the new central school district is required to operate.

Under New York State Education Law, Section 1805, the new central school district must continue the operation of the "Brookville" elementary school until the voters of "Brookville" vote to close the school, or until five years from the effective date of the centralization. Even then, with the increasing enrollments, it is a foregone conclusion that the new district will not be able to close that school.

Education Law, Section 1804, subdivision 5, guarantees to "Brookville" its property rights to its school, including site, buildings and contents. If these are ever to be sold and "Brookville's" bonded indebtedness is by that time still outstanding, subdivision 6 of said Section 1804 provides that the proceeds of such sale must first be used to pay up such bonded indebtedness. The subdivision further provides that any balance of said proceeds must be returned to the taxpayers of "Brookville" as they appear on the last completed town assessment roll prior to the date of sale, unless the "Brookville" voters themselves vote to turn over such balance to the central school district.

In addition, Section 1806 provides a formula for the apportionment of State funds to central school districts, specifically for building purposes. The formula, ourse, provides for larger payments to poorer districts and smaller payments to the wealthier districts, but nevertheless the building quota may amount to substantial sums, thus relieving the local taxpayers, *pro tanto*, of the burden of the construction of the new facilities for the new central school district.

Furthermore, if "Brookville's" bonded indebtedness was contracted before 1947, subdivision 4 of Section 1806 provides for payment by the State of the entire debt service on such individual district indebtedness of "Brookville", minus two mills on true value.

Furthermore, "Brookville", to the extent that members of the central school district may be elected from among its own residents, will have a measure of control over the affairs of the new central school district. Presently they have no control over the fate of the high school students attending other school districts, except through possible contractual arrangements predicated entirely upon availability of space which is becoming more and more scarce in the area.

It is, consequently, respectfully submitted that appellants' contentions to the effect that they are getting no benefit whatever from this reorganization are wholly untenable. It is probably true, however, that the comparative amount of benefits to be derived by "Brookville" may be smaller than that derived from the centralization by the other two districts therein. The system, however, under which all burdens of sustaining governmental services are made absolutely equal for all citizens of the community,

be it local, State or otherwise, has not yet been invented (*Kelly v. Pittsburgh*, 104 U. S. 78).

Appellants make mention of the fact that the New York State Education Law requires component districts to pay their own indebtedness. In support of their position that this provision raises a Federal question, they rely on *Attorney General of the State of Michigan ex rel. Kies v. Lowrey*, 199 U. S. 233. This case, however, clearly supports appellee instead of appellants. The Michigan statute involved in that case admittedly spreads the debts of the component districts over the entire new central school district. *At the same time, however, that statute vested title to the property of all component districts in the new central district as a corollary to such spreading of the debt.*

It is respectfully submitted in this regard that even if the question of the constitutionality of subdivision 5 of Section 1804 were before this Court, which, of course, it is not, that this case by no means supports appellants' position in this case, but that, on the contrary, at least by clear implication, it supports appellee on this point.

4. Prior Holdings of the New York State Courts Relating to the Constitutionality of Education Law, Section 1801

The constitutionality of New York State Education Law, Section 1801, has heretofore been upheld in the following cases:

Gardner v. Ginther, 232 App. Div. 296; aff. 257 N. Y. 578;

Board of Education v. Wilson, 277 App. Div. 809; aff. 303 N. Y. 107;

Monaco et al. v. Allen, 5 A. D. 2d 743; 4 N. Y. 2d 1032.

5. Prior Holdings of Federal Courts and the United States Supreme Court in similar cases

(a) The questions before this Court have already been determined by a Federal Court, *i.e.*, the United States District Court for the Northern District of New York, in which an opinion was rendered by Judge Brennan in 1949. Since the case is not reported, the full text of the opinion is attached hereto as "APPENDIX A" and made a part hereof.

(b) This Court held in *Highland Farms Dairy v. Agnew*, 300 U. S. 608 at 612 as follows:

> "How power shall be distributed by a State among its governmental organs is commonly, if not always, a question for the State itself."
>
> *Laramie County v. Albany County*, 92 U. S. 307, and many cases cited;
>
> *Worcester v. Street Railway*, 196 U. S. 539.

(c) Where remedy exists in State Courts concerning a matter primarily of State Law, the Federal Courts will hesitate to assume jurisdiction under the principles of comity.

> *Defiance Water Co. v. Defiance*, 191 U. S. 184;
> *Shanks v. Banting Manufacturing Co.*, 9 F. 2d 116;
> *New Orleans v. Benjamin*, 153 U. S. 411, 424.

(d) Jurisdiction must be based on genuine and present controversies, not merely possible or conjectural problems.

> *Gully v. First National Bank*, 299 U. S. 109, 113;
> *Koster v. Turchi*, 173 F. 2d 605.

(e) *A finding of a substantial Federal question is foreclosed herein by decisions which this Court has made on the issues here involved.*

It is well settled law that the jurisdiction of this Court is foreclosed where the Federal question presented is plain-

ly unsubstantial because the question has been settled by prior decisions of this Court, so that the question can no longer be the subject of controversy.

In the words of Mr. Justice Sutherland in *Levering & Garrigues Co. et al. v. Morrin et al.*, 289 U. S. 103, the Federal question here alleged is "plainly unsubstantial * * * because its unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy."

To the same effect are:

California Water Service et al. v. Redding et al., 304 U. S. 252;
Hannis Distilling Company v. Baltimore, 216 U. S. 285, 288;
McGilvra v. Ross, 215 U. S. 70, 76, 77-80;
Norton v. Whiteside, 239 U. S. 144;
Bianchi v. Morales, 262 U. S. 170;
Leonard v. Vicksburg S. & P. R. Co., 198 U. S. 416, 421 and cases cited therein;
Delmar Jockey Club v. Missouri, 210 U. S. 324, 335.

(f) As far as the questions themselves are concerned, the following cases have heretofore been decided by this Court, thus foreclosing the subject.

In *Newton v. Commissioners*, 100 U. S. 548, this Court upheld the power of a State to provide for the moving of a County seat, in spite of the locality having expended considerable sums to build a Courthouse, because of the absolute police power of the State over its subordinate or municipal corporations or other public bodies. The deci-

sion also affirmed the complete power of the State over all public offices within its reach which may be at pleasure created or abolished.

In *Mount Pleasant v. Beckwith*, 100 U. S. 514, this Court upheld the right of the State of Wisconsin to abolish a town and annex its territory to two other towns and thereafter to annex a piece of one of the newly reorganized towns to a city, without making any rules as to transfer of indebtedness. This case is particularly apposite to appellants' claims in relation to the requirement of the New York State law that each component school district must continue to pay its own indebtedness. The Court stated at page 525 as follows:

> "Debts previously contracted must be paid entirely by the old corporation, nor has the new municipality any claim to any portion of the public property except what falls within her boundaries, and to that the old corporation has no claim whatever. Laramie County v. Albany County, 92 U. S. 307."

This holding relates to a case where no statutory regulation is made relating to the transfer or retention of indebtedness.

In this connection it will be remembered that in *Attorney General of the State of Michigan ex rel. Kies v. Lowrey*, 199 U. S. 233, this Court held that there was no constitutional question presented in the case of centralization of school districts under a Michigan statute where all property vested in the new school district and all indebtedness of component school districts spread over the new district.

In *Kelly v. Pittsburgh*, 104 U. S. 78, this Court upheld the power of the State of Pennsylvania to set a part of the Town of Alleghany into the City of Pittsburgh against

the claim of the owner that this violated due process under the Fourteenth Amendment because of the imposition of city taxes on a farm. This case expressly refers to school taxes and the Court stated that as long as the tax was levied for a public purpose, this raised *no constitutional question, even though the owners of the farm might derive a smaller benefit than the owners of other property in the city*, the Court stating that a school tax had to be paid as well by those in the city who have no children.

The Court there indicated that it was not concerned with comparing benefits as a basis for the raising of a constitutional question. This case is apposite, therefore, while the case cited by appellants as a proper basis for jurisdiction of this Court (*Myles Salt Co. v. Board of Commissioners*, 239 U. S. 478) is completely irrelevant in this connection. In that case the Court found that the property in question was not, and in fact could not be, benefited at all by the extension of the drainage district to such land. In fact the Court found that the land in question was not, and could not be, benefited directly or indirectly. The Court was careful to point out, however, that "*We are not dealing with disputable grounds of discretion or disputable degrees of benefit, but with an exercise of power determined by consideration not of the improvement of plaintiff's property but solely of the improvement of others,—power, therefore, arbitrarily exerted imposing a burden without a compensating advantage of any kind*" (Emphasis supplied).

Another completely apposite decision of this Court was made in *Hunter v. Pittsburgh*, 207 U. S. 161. Here the city of Alleghany was annexed to the city of Pittsburgh under a unit vote statute where the entire enlarged area voted as a unit under circumstances where the voters of

the smaller city were completely outvoted. The unit vote is the basis also of the establishment of the New York State central school district. In that case the due process argument was made, as it is here by appellants, and this Court completely disposed of the question by stating that the State by realignment of the territorial limits of a municipal corporation may shift real property to a new or different tax district without creating a Federal question, and that the method of voting there involved raises no constitutional question.

A similar decision was made in the case of *Cole et al. v. Norborne Land Drainage District*, 270 U. S. 45. Here the question involved related to a tax for drainage where land was added to a drainage district in Missouri against the wishes of the owner under the claim that this was a tax for benefits they did not share. Mr. Justice Holmes held, writing for the Court, that no violation of the due process clause was involved.

Appellants also seek to base their claim to jurisdiction of this Court on the case of *Securities and Exchange Commission v. Chenery Corporation*, 332 U. S. 194. Again, this case on the contrary supports appellee's position. The Court stated, at page 207, as follows:

> "The facts being undisputed, we are free to disturb the Commission's conclusion only if it lacks rational and statutory foundation."

From the discussion hereinabove it seems abundantly clear that appellee based his determination on a fully reasonable and rational basis and fully complied with the statutory requirements and procedures of the New York State Education Law in making his order of March 29, 1957, which is here under attack. The State Courts

unanimously determined that there was no dispute as to the facts, as the record shows.

It is, therefore, respectfully submitted that even if this appeal had been brought in a timely fashion, and even if all questions allegedly presented upon this appeal were properly before the Court, nevertheless the Federal questions sought to be presented, are plainly unsubstantial in that they have been completely foreclosed by large numbers of prior decisions of this Court, so that these questions can no longer be the subject of controversy in this Court.

CONCLUSION

For the foregoing reasons it is respectfully urged that the appeal herein should be dismissed.

CHARLES A. BRIND,
Attorney for Appellee,
Office & P. O. Address,
State Education Building,
Albany, New York.

JOHN P. JEHU,
ELIZABETH M. EASTMAN,
GEORGE B. FARRINGTON,
of Counsel.

APPENDIX A.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

—o—

LEONARD W. JENNE, ROY D. MILLS, RAYMOND L. MALONEY, MABEL B. JENSEN, MILTON DOUGHTON, LESLIE HORNER, LELA BETTIS, WALTER HALKO, STEVE G. ORMAN, THELMA S. HEFFER, individually and as Trustees respectively of Common School Districts Lysander #1, Lysander #11, Van Buren #4, Van Buren #2, Lysander #14, Lysander #2, Van Buren #9, Lysander #10, Lysander #1, all of the County of Onondaga, State of New York,

Plaintiffs,

vs.

STATE OF NEW YORK and FRANCIS T. SPAULDING, Commissioner of Education of the State of New York,

Defendant.

—o—

Appearances:

Furcinito & Rinaldo, Attorneys for Plaintiffs, S. A. & K. Building, Syracuse, New York, Mr. Charles R. Rinaldo, of Counsel.

Hon. Nathaniel L. Goldstein, Attorney General of State of New York, Attorney for Francis T. Spaulding, Comr. Education of the State of New York, Albany, New York, Ruth Kessler Toch, Asst. Attorney General, of Counsel.

Motion to Dismiss.

Argued May 17, 1949, Submitted May 19, 1949, Decided May 24, 1949.

BRENNAN, Judge.

Appendix

Opinion.

The plaintiffs bring this action as individuals and trustees of certain common school districts located in the Towns of Lysander and Van Buren, Onondaga County, New York, to restrain the defendant, as Commissioner of Education of the State of New York, from proceeding in accordance with the provisions of Article 37 of the Education Law of the State of New York, (referred to in the complaint as Article 33), in the matter of the formation of a central school district. The crux of the action is the alleged unconstitutionality of the pertinent provisions of the Education Law of the State.

The present status of the action is as follows. A complaint was heretofore filed with the Clerk of this Court. A summons was issued and the defendant has appeared but has not yet answered. The original complaint prayed for temporary and permanent injunctions restraining the defendant from issuing an order under the provisions of Section 1801 of the Education Law which, in effect, would designate a certain territorial area which might later ripen into a legally functioning centralized school district, in accordance with the procedural provisions of the Law. Assuming the jurisdiction of this Court, the issuance of an interlocutory or permanent injunction required the convening of a three-judge court in accordance with the provisions of Title 28 U. S. C. 2281, etc. A temporary restraining order was applied for and was denied under the provisions of Title 28 U. S. C. 2284, subdivision 5. Upon the hearing relative to the temporary restraining order, the question of the jurisdiction of this Court was raised by the defendant, and since such question appeared to

be serious, a date was set for argument thereon. Prior to the date of argument the plaintiff served an amended complaint. The amendment made did not appear to obviate the objections to jurisdiction, so that argument was addressed to the amended complaint; briefs were filed, and the question is submitted for decision.

Upon the argument the power of a single judge to determine jurisdiction in this case was raised by the plaintiffs. It is understood that such question is no longer seriously urged, and no further discussion thereof is necessary, except to state that the reported cases seem to be uniform in holding that the matter of the convocation of a three-judge court, is one of legal concern and practical importance, and that it is the duty of the judge to whom the application for an injunction is presented to scrutinize the complaint and determine whether or not jurisdiction exists.

Ex parte Porseky, 290 U. S. 30;
Carras, *et al.* vs. Monoghan (Dravo Corp., Intervener), 65 F. Sup. 658;
Priceman v. Dewey, Gov. *et al.*, 81 F. Sup. 557.

The amended complaint now before the Court is not a model of pleading. Its first allegation is "The action arises under the Fourteenth amendment of the Constitution of the United States, as hereinafter more fully appears." It is, therefore, definite that plaintiffs depend upon the existence of a question in this action which arises under the Constitution of the United States. The basis of jurisdiction, therefore, must be found in Title 28 U. S. C. 1331, which provides in substance that the district courts shall have original jurisdiction of all actions where the matter in controversy exceeds the sum or value of three

thousand dollars, exclusive of interest and costs, and arises under the Constitution of the United States. The section by its language requires, (a), that the matter in controversy exceeds the sum or value of three thousand dollars; (b), the existence of a constitutional question. Recourse must be had to the complaint to determine whether or not such elements are found therein.

Nowhere in the complaint is there any allegation of a money loss to the plaintiffs, either individually or collectively. No attempt is made to allege in any manner the value of the rights which plaintiffs claim are affected or presently endangered. The language of the statute upon which plaintiffs depend to give this Court jurisdiction requires that it must be pleaded that the matter in controversy exceeds the sum or value of three thousand dollars. If such an allegation be challenged, the plaintiffs must support same by proof. Hence, it appears without question that the complaint is insufficient on its face. The following quotation is applicable here.

> "The prerequisites to the exercise of jurisdiction are specifically defined and the plain import of the statute is that the District Court is vested with authority to inquire at any time whether these conditions have been met. They are conditions which must be met by the party who seeks the exercise of jurisdiction in his favor. *He must allege in his pleading the facts essential to show jurisdiction. If he fails to make the necessary allegations he has no standing.* If he does make them, an inquiry into the existence of jurisdiction is obviously for the purpose of determining whether the facts support his allegations" (Emphasis supplied).
>
> McNutt v. General Motors, etc. Corp., 298 U. S. 178 at 189.

Appendix

The following decisions with the cases cited therein are additional authorities for the conclusion reached above.

American Distilling Co. v. City of Sausalito, 73 F. Sup. 520;

Troy Laundry Co. v. Lockwood, 63 F. Sup. 384;

Buck v. Case, 24 F. Sup. 541 (Reversed on procedural grounds 307 U. S. 95).

The decision might end here, but since the existence of a constitutional question was argued and briefed by the parties, it is deemed advisable to resolve the conflict to avoid further unnecessary litigation.

Plaintiffs seem to rely upon their status as (a), trustees of common school districts possessing powers and charged with duties as provided by the Education Law of the State; (b), as voters within their particular school districts; (c), as taxpayers and real estate owners within their particular autonomous school tax area. They allege in a somewhat conclusive manner that their rights and their properties will be adversely affected if the defendant should make and enter in his office an order laying out territory which would include their properties in a proposed new central school district, as authorized by Section 1801 of the Education Law. Upon the argument the Court was impressed that the plaintiffs' principal claim was that the statute under consideration constitutes an unlawful delegation of power to the defendant Commissioner; that such delegation is in violation of the United States Constitution.

An examination of the statute involved discloses that the proposed action of the Commissioner is but an administrative act or a procedural means which will afford a basis

for further action by the qualified voters within the territory affected.

After the order above referred to is filed, the statute provides that a petition *may be* presented by the required number of qualified voters, which petition in substance requests that a central school district be organized or established embracing the territory referred to in the order. The petition is to be filed with the Commissioner, and if he finds same to be in accordance with law, he shall fix a time and place for a meeting of the qualified voters of the proposed district. At such meeting, the voters may by their votes adopt or reject the proposed establishment of a central school district. In the event that centralization is rejected, then the common school districts, and the officers thereof, such as represented by the plaintiffs herein would be unaffected. In the event that centralization is adopted, the statute provides in some detail for the functioning thereof, and the consolidation of the common school districts therein. The burden of plaintiffs' complaint is that the anticipated order of the Commissioner which has not yet been issued—although it is undisputed that the issuance of such an order is contemplated—would set in motion proceedings outlined above, which would result in plaintiffs' damage. It seems clear, however, that no actual damage can flow from the issuance of the order, since it has no force until and unless three subsequent events happen: (1), the inhabitants of the district desire to submit the question of centralization to a vote of the inhabitants and they express such desire in the form of a petition as provided by statute; (2), the Commissioner finds the petition sufficient under the law and designates a time and

place for a meeting of the voters of the area affected; and (3), the voters at such meeting by their votes favor the centralization of the area for educational purposes.

The allegations and inferences of the complaint and the statements made upon argument that these plaintiffs would be deprived of the office of trustee in their respective school districts; that the power of their votes as constituent members of their individual school districts will be lost; that they will be adversely affected by the creation of a new school tax district, are all theoretical rather than definite, and depend upon action in the future by the voters of the district which no one can successfully foretell, and concerning which this Court is not allowed to speculate.

The constitutionality of the sections of the Education Law of the State has been directly passed upon in the state courts. (Gardner v. Ginther, 232 A. D. 296; affirmed without opinion in 257 N. Y. 578.) The opinion discusses the question at length and with clarity. It, in effect, holds that the action of the Commissioner complained of herein is an administrative and not a legislative act. The history of the Education Law of the State is outlined therein in a clear and persuasive manner. The State must legislate within the framework of the United States Constitution, and the decision in the cited case is highly persuasive here.

> "How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself."
>
> Highland Farms Dairy v. Agnew, 300 U. S. 608 at 612.

The existence of a federal or constitutional question is the subject of many judicial decisions covering a long period

of time. It may be correct that all judicial precedents may not be reconciled, but it seems to be well recognized that where a remedy exists in state court concerning a matter primarily of state law, the federal courts will hesitate to assume jurisdiction under the principles of comity.

> Defiance Water Co. v. Defiance, 191 U. S. 184;
> Shanks v. Banting Mfg. Co., 9 F. 2nd 116;
> New Orleans v. Benjamin, 153 U. S. 411, 424;

It is also uniformly recognized that "A genuine and present controversy, not merely a possible or conjectural one must exist * * *" to sustain jurisdiction.

> Gully v. First National Bank, 299 U. S. 109, 113;
> Koster v. Turchi, 173 F. 2nd 605.

Here, as in American Distilling Co. v. City of Sausalito, *supra*, any injury is subject to a condition precedent; to-wit; the ratification by the voters of the discussed plan, which, of course, may never occur. (See also Highland Farms Dairy v. Agnew, *supra*.)

In determining jurisdiction here the finding of a substantial federal question may be foreclosed by decisions which have already determined the issues raised. (Levering & G. Co. v. Morrin, 289 U. S. 103; Water Service Co. v. Redding, 304 U. S. 252.) An examination of the issues sought to be raised in the complaint indicates that such a situation exists here. Same will be briefly referred to. The office of trustee may be abolished or the duties thereof modified. (Newton v. Commissioners, 100 U. S. 548 at 559.) Municipal corporations created by the authority of the State Legislature are subject to the control of the state creating them. (Mt. Pleasant v. Beckwith, 100 U. S.

514, 534.) The State by re-alignment of the territorial limits of a municipal corporation may shift real property to a new or different tax district. (Kelly v. Pittsburgh, 104 U. S. 78; Hunter v. Pittsburgh, 207 U. S. 161, 179.) The method of voting upon the question of centralization raises no constitutional question. (Hunter v. Pittsburgh, *supra*, at 177; Cole v. Norborne Drainage Dist., 270 U. S. 45.)

As seems to be peculiar to this type of action affecting inhabitants of a comparatively small territorial area, this case has prompted arguments which are of no force, and the motives and actions of the champions of opposing forces are of no concern whatever. The question is solely one of jurisdiction, and that question alone is decided here.

As indicated above, this Court is without jurisdiction, and the complaint must be dismissed.